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Supreme Court of the United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AI PETITIONERS,

vs.

LINCOLN W. MULKEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED AUGUST 25, 1966

CERTIORARI GRANTED DECEMBER 5, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL., PETITIONERS,

vs.

LINCOLN W. MULKEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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[fol. A]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Civil No.. .....

LINCOLN W. MULKEY, et al., Plaintiffs and Appellants,

vs.

NEIL REITMAN, et al., Defendants and Respondents.

Appeal from the Superior Court of Orange County
Honorable Raymond Thompson, Judge

Excerpts From Clerk's Transcript

APPEARANCES

For Plaintiffs and Appellants

David R. Caldwell, Attorney at Law, 1923 West 17th Street, Santa Ana, California.

For Defendants and Respondents

Richard V. Jackson, Attorney at Law, 800 South Brookhurst, Suite 30, Anaheim, California.

[fol. 2]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

No. 113493

LINCOLN W. MULKEY and DOROTHY J. MULKEY, Plaintiffs,

vs.

NEIL REITMAN, HERMAN STRAESSER, MRS. HERMAN STRAESSER, PEGGY WATSON, DOE I and DOE II.

COMPLAINT FOR DAMAGES (Denial of Civil Rights)—Filed May 29, 1963

Plaintiffs Allege:

I

Plaintiffs are husband and wife respectively: They are citizens of the United States and residence of the County of Orange, State of California; they are members of the Negro Race, and they are colored. Suit is filed also as a class action in behalf of all persons discriminated against because of their race and/or color as described herein below.

II

The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Doe One and Doe Two are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs will ask leave of Court to amend their complaint to insert the true names of said defendants when same are ascertained.

III

[fol. 3] Defendants are engaged in the business of renting apartments to members of the public. Defendants, Neil

[File endorsement omitted]

Reitman and Doe I own an apartment building located at 1030 West Highland Street, City of Santa Ana, County of Orange, State of California. At all times mentioned herein defendants Herman Straesser, Mrs. Herman Straesser, Peggy Watson and Doe II were, and now are the managers of said apartment building and were and now are, the agents, servants and employees of the other defendants. At all times mentioned herein one or more apartments in said apartment building, were, and now are, unoccupied, and defendants offered them for rent to the public generally.

IV

In May of 1963, plaintiffs, who were willing and able to, offered to rent one of the apartments, referred to in Paragraph III from defendants.

V

Defendants have discriminated against plaintiffs, and have made a discrimination, distinction and restriction on account of plaintiffs' Color and Race contrary to the provisions of Sections 51 and 52 of the Civil Code of the State of California, in that they refused to allow plaintiffs to rent any of the apartments referred to in Paragraph III herein, solely on the basis of their Race and Color, although plaintiffs were and now are able to and desirous of renting said apartments.

[fol. 4]

VI

As a proximate result of the above conduct of the defendants, plaintiffs have been unable to rent an apartment, home, or other suitable place in which to live, and have suffered humility and disappointment, and have endured mental pain and suffering, all to their general damage in the sum of $50,000.00.

VII

Unless enjoined by order of Court, *pendente lite* and permanently, the defendants threaten to and will, in the course of business, refuse to rent apartments to the plaintiffs solely because they are colored and members of the Negro Race, and the defendants will similarly refuse to rent apartments to other persons soley because of such Color and Race.

VIII

By virtue of the acts of defendants complained of herein, plaintiffs, and those in the same class as plaintiffs, have suffered irreparable injury; and they have no adequate remedy at law because the discrimination by the defendants aforesaid is also practiced by other real estate brokers, home and apartment landlords and owners in Orange County and throughout California, resulting in preventing the plaintiffs and other American Citizens of the Negro Race and color from renting homes and apartments in Orange County as well as in California. Unless defendants [fol. 5] are enjoined from discriminating, plaintiffs will suffer irreparable harm because the apartments referred to herein will be rented to others.

Wherefore, plaintiffs pray judgment as follows:

1) That an immediate Order, an injunction pendente lite, and a permanent injunction issue from this Honorable Court, enjoining defendants from discriminating against plaintiffs and others similarly situated because of their Race and/or Color in the renting of apartments located at 1030 West Highland Street, in the City of Santa Ana, County of Orange, State of California, to plaintiffs, and others similarly situated, solely because of their race and/or color;

2) For general damages in the sum of $50,000.00;

3) For statutory damages in the sum of $250.00;

4) For exemplary damages in the sum of $50,000.00;

5) For costs of suit herein; and

6) For such other and further relief as the Court deems proper.

David R. Cadwell, Attorney for Plaintiffs.

[fol. 39]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

[Title omitted]

ANSWER TO COMPLAINT—Filed August 7, 1963

Comes now the defendants, Neil Reitman, Herman Straesser, Mrs. Herman Straesser; and Peggy Watson, and severing themselves from all other defendants herein, jointly and severally, admit, deny and allege as follows:

I

Defendants have no information or belief sufficient to enable them to answer the allegations of Paragraph I of the complaint, and basing their denial upon that ground, deny generally and specifically each and every allegation thereof.

II

Answering Paragraph III of the complaint, these defendants admit that Neil Reitman and Herman Straesser are engaged in the business of renting apartments to members of the public and that defendant Neil Reitman owns an apartment building located at 1030 West Highland Street in the City of Santa Ana, County of Orange, State of Cali-

[File endorsement omitted]

fornia. Further defendants admit that at all times mentioned in the complaint, defendant Herman Straesser was the manager of said apartment building and was in that [fol. 40] capacity an agent for defendant Neil Reitman. Further defendants admit that at all times mentioned in the complaint, one or more apartments in said apartment building were unoccupied and were being offered for rent to the public, and with these exceptions deny each and every matter, fact and allegation contained therein, and each and every part thereof, both generally and specifically.

III

Answering Paragraphs IV, V, VI, VII and VIII of plaintiffs' complaint on file herein, these answering defendants deny each and every, all and singular, generally and specifically and specifically, deny that plaintiffs offered to rent from defendants on the alleged occasion or on any other occasion whatsoever or at all or that plaintiffs have been injured or damaged in the sums alleged, or in any other sum or sums whatsoever or at all.

Comes Now the Defendants And For A First Affirmative Defense Allege:

I

Defendants are informed and believe and there on allege that at all times herein mentioned, the plaintiffs, Lincoln W. Mulkey, Dorothy Mulkey and plaintiffs witness Charles Canfield, were the agents of the National Association for the Advancement of Colored People and were acting within the purpose and scope of said agency at all times herein [fol. 41] mentioned. The National Association for the Advancement of Colored People hereinafter referred to as the N.A.A.C.P. for brevity sake and the American Civil Liberties Union, hereinafter referred to as the A.C.L.U. for brevity sake, acting through the plaintiffs and plaintiffs complaining witness Charles Canfield, have adopted and seek to enforce a policy which creates Civil strife and

incidents of alleged discrimination against Negro citizens within the State of California to give credence to their claims of discrimination in California to enforce demands for preferential treatment.

II

Pursuant to such policy, the N.A.A.C.P. and the A.C.L.U., its agents, the plaintiffs and the complaining witness herein have among other things:

(a) Maintained a system of continuous harrassment and creation of forced incidents against landlords in California and against defendants so that, upon information and belief, landlords throughout the State and the defendants are systematically harassed and subjected to artificially create racial incidents.

III

In order to make continued harrassment and incidents possible:

(a) The N.A.A.C.P. has systematically sought through its agents including the plaintiffs herein, to create litigation against landlords in California and the defendants [fol. 42] through the utilization of professional complaining witnesses and the creation of evidence of discrimination in bad faith where none existed.

IV

The aforesaid policy of these aforementioned organizations and their agents the plaintiffs herein, in creating litigation against landlords and the defendants herein in California is contrary to basic and inherit moral rights of the defendants; the purpose of the continuation of such policy is to maintain an unequal and unfair bargaining position with landlords in California to enable Negroes to obtain preferential treatment over members of other races in the State of California.

V

The instant complaint was filed by the N.A.A.C.P. as a part of the policy of that organization in enforcing and creating racial incidents upon which they base their demands for preferential treatment; that the plaintiffs herein and the N.A.A.C.P. have brought like litigation against other landlords in the State of California using the same complaining witness Charles Canfield; that in the instant case Richard Mulkey and the other plaintiffs herein never met the landlord or manager or agent of the landlord or manager prior to the bringing of this action alleging discrimination by the defendants herein; that Richard Mulkey and the plaintiffs herein never offered to rent from [fol. 43] the defendants herein; never gave the defendants herein the opportunity to ask any questions concerning the plaintiffs prospective ability to meet the rental payments and be responsible tenants. That the purpose of this litigation is to advance Negro demands in Orange County and in the State of California for better than equal treatment.

VI

The plaintiffs are figure head plaintiffs only and the real parties in interest are the N.A.A.C.P. and the A.C.L.U. who defendants are informed and believe and thereon allege are paying 60% and 40% of the costs of this suit respectively; that plaintiffs counsel is an attorney who in the general course of practice regularly represents the N.A.A.C.P. the A.C.L.U. and the Congress of Racial Equality and is so representing the N.A.A.C.P. in this proceeding; that the profits from this litigation, if any, go to the N.A.A.C.P. and the A.C.L.U. in respective shares, the proceeds to be utilized in like actions; that the named plaintiffs are paying little, if any, of the costs of this litigation and share little, if any, of any recovery herein sought.

VII

The action was commenced and is being prosecuted by plaintiffs and their principals against defendants without probable cause, and with a malicious intent for the purpose of annoying and harrassing the defendants.

VIII

[fol. 44] By reason of the aforesaid, plaintiffs come into this proceeding with unclean hands and under circumstances which as a matter of law and equity require judgment dismissing the complaint and petition for injunction herein.

Wherefore, defendants pray that plaintiffs take nothing by reason of their action and that defendants have and recover their costs of suit incurred herein.

Jackson and Thomason, By Richard V. Jackson, Attorneys for defendants.

We declare that we are the defendants in the within entitled action; that we have read the foregoing Answer to Complaint and know the contents thereof, and that the same is true as of our own knowledge, except as to these matters alleged on information and belief, and as to those matters, we believe them to be true.

We declare under penalty of perjury that the foregoing is true and correct.

Dated at Anaheim, California this 5 day of August, 1963.

Neil Reitman, Herman Straesser, Mrs. Herman Straesser, Peggy Watson.

[fol. 62]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS AND DECLARATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF—Filed December 23, 1964

To: Lincoln W. Mulkey and Dorothy J. Mulkey, Plaintiffs, and David R. Cadwell, their attorney:

Notice Is Hereby Given that on Thursday, December 31, 1964, at 9:30 A.M., or as soon thereafter as the matter can be heard, at the Court room of Department 4, of the above-entitled Court, at Santa Ana, California, Defendants will move the Court for an Order dismissing the Complaint and for entry of Summary Judgment in favor of Defendants and against Plaintiffs as prayed in the Answer herein.

Said motion will be made upon the ground that the action has no merit in that the passage of Proposition 14 has rendered Civil Code Sections 51 and 52 upon which this action is based null and void.

Said motion will be based upon this notice, the pleadings, records, and files herein and upon the declaration of Richard V. Jackson, attorney for Defendants, and the [fol. 63] memorandum of points and authorities filed and served herewith.

Dated: December 18, 1964.

Jackson, Thomason & Gillette, By Richard V. Jackson, Attorneys for Defendants.

[File endorsement omitted]

[fol. 64]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

[Title omitted]

No. 113493

DECLARATION IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—Filed December 23, 1964

I, Richard V. Jackson, declare and say:

That I am the Attorney for Defendant, Neil Reitman, et al., above-named; that the 1964 passage of Proposition No. 14, prevents further proceedings under Civil Code Sections 51 and 52, and that whether Defendants refuse to allow Plaintiffs to rent an apartment solely on the basis of their race and color, has become a moot point because Proposition 14, a Constitutional Amendment, prohibits all actions by the State, or any agency thereof, in this field, thus preventing the enforcement of Civil Code Sections 51 and 52.

Also, Plaintiffs seek a permanent injunction, prohibiting Defendants from discriminating forever on the grounds of race, color, or creed, in the rental of their property.

Any enforcement of Sections 51 and 52 by the Court would clearly appear to be State action, which would be applied prospectively beyond the power of the Court under the Amendment referred to herein.

[fol. 65] I declare under penalty of perjury that the foregoing is true and correct.

Executed at Anaheim, California, this 18th day of December, 1964.

Jackson, Thomason & Gillette, By Richard V. Jackson, Attorneys for Defendants.

[File endorsement omitted]

[fol. 70]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

MINUTE ENTRY OF GRANTING MOTION FOR SUMMARY JUDGMENT—December 31, 1964

Motion granted.

[fol. 71]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

[Title omitted]

ORDER ENTERING JUDGMENT FOR DEFENDANTS—January 8, 1965

The Motion of the defendants herein for Judgment having come on regularly for hearing the 31st day of December, 1964, and plaintiffs appearing by David R. Cadwell, their counsel, and defendants appearing by Richard V. Jackson, their counsel, and both parties having agreed that further prosecution of this action is barred by the provisions of that amendment to the California Constitution known as "Proposition 14", the plaintiffs, however, having contended that said constitutional amendment should not be applied as it is void as being inconsistent with our state and federal constitutions, and the matter having been submitted for decision and good cause appearing therefore, and the Court having determined that a valid amendment to our State Constitution having been enacted by the people which bars further prosecution of this case.

It Is Hereby Ordered that Judgment be entered for defendants against the plaintiffs.

Dated: January 5, 1965.

Raymond Thompson, Judge of the Superior Court.

[File endorsement omitted]

[fol. 72]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

No. 113493

LINCOLN W. MULKEY and DOROTHY J. MULKEY, Plaintiffs,

vs.

NEIL REITMAN, HERMAN STRAESSER, MRS. HERMAN STRAESSER, PEGGY WATSON, DOE I and DOE II, Defendants.

JUDGMENT—January 8, 1965

Defendants Motion for Judgment having been granted and good cause appearing therefore;

It Is Hereby Ordered, Adjudged and Decreed that defendants have Judgment in the within action, and that plaintiffs take nothing by their action.

Dated: January 5, 1965.

Raymond Thompson, Judge of the Superior Court.

[fol. 73]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

[Title omitted]

NOTICE OF APPEAL AND DESIGNATION OF CONTENTS OF TRANSCRIPT ON APPEAL—Filed January 22, 1965

To W. E. St. John, Clerk of the Superior Court:

You Will Please Take Notice that Plaintiffs hereby appeals to the Supreme Court from the Judgment of the Court

[File endorsement omitted]

in favor of defendants on January 5, 1965, and the whole thereof.

You are hereby requested to prepare a Record on Appeal consisting of the items contained in the Stipulation of the parties filed herein.

You are further requested to prepare a Reporter's transcript of all oral proceedings on December 31, 1964.

David R. Cadwell, Attorney for Plaintiffs.

[fol. 74] Proof of Service by Mail (omitted in printing).

[fol. 78] Clerk's Certificate (omitted in printing).

[fol. 79]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

LINCOLN W. MULKEY et al., Plaintiffs and Appellants,

v.

NEIL REITMAN et al., Defendants and Respondents.

OPINION—May 10, 1966

Plaintiffs appeal from a summary judgment entered upon the granting of a motion therefor in an action for relief under sections 51 and 52 of the Civil Code.[1]

---

[1] Civil Code, section 51, provides as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code, section 52, provides as follows:

"Whoever denies, or who aides, or incites such denial, or whoever makes any discrimination, distinction or restriction on account

[File endorsement omitted]

[fol. 80] In the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations. The motion for judgment, therefore, properly should be designated as one for judgment on the pleadings and will be so treated on appeal. In any event the allegations of the complaint stand as admitted for our purposes. (See Davis v. City of Santa Ana, 108 Cal.App. 2d 669, 685.)

Plaintiffs' complaint sets forth that they are husband and wife, citizens of the United States and residents of the County of Orange; that they are Negroes; that defendants are the owners and managers of a certain apartment building in Orange County; that in May 1963 at least one apartment therein was unoccupied and was being offered by defendants for rent to the general public; that plaintiffs offered to rent any one of available apartments and were willing and able to do so; that defendants refused to rent any of the available apartments to plaintiffs solely on the ground that plaintiffs were Negroes; that because of such refusal plaintiffs were unable to rent a suitable place to live; that they suffered humiliation and disappointment and endured mental pain and suffering; that defendants will continue to refuse to rent to plaintiffs and other members of their race solely on the ground of such race unless restrained by order of the court; that plain-
[fol. 81] tiffs have no adequate remedy at law because the discrimination practiced by defendants is also practiced by other real estate brokers, and home and apartment landlords and owners in Orange County.

The motion for judgment was made and granted solely on the ground, as stated by the trial court, "that the pass-

---

of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

age of Proposition 14 has rendered Civil Code Sections 51 and 52 upon which this action is based null and void." The reference is to the initiative measure which appeared as Proposition 14 upon the statewide ballot in the general election of 1964. Following its approval by the voters it was incorporated into the California Constitution as article I, section 26.

Plaintiffs unsuccessfully opposed the motion on the ground that article I, section 26, is void for constitutional reasons under both the state and federal Constitutions. This contention presents the sole question on appeal.

Proposition 14, as now incorporated into the California Constitution, provides in full as follows:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, [fol. 82] lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

" 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

" 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or cir- [fol. 83] cumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable." (Cal. Const., art. I, § 26.)

For reasons which hereafter appear we do not find it necessary to discuss claims of the unconstitutionality of article I, section 26, based on California constitutional provisions and law. Our resolution of the question of constitutionality is confined solely to federal constitutional considerations. We note preliminarily that although we are examining a provision which, by its enactment by ballot, has been accorded state constitutional stature, the supremacy clause of the United States Constitution nevertheless compels that section 26, like any other state law, conform to federal constitutional standards before it may be enforced against persons who are entitled to protection under that Constitution. (See Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736-737.)

A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (In re Petraeus (1939) 12 Cal.2d 579, 583; see Griffin v. County School Board, 377 U.S. 218, 231), and for its ultimate effect (Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 880; Gomillion v. Lightfoot (1960) 364 U.S. 339, 341-343; Avery v. Georgia (1953) 345 U.S. 559, 562; Near v. Minnesota (1931) 283 U.S. 697, 708- [fol. 84] 709). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; Evans v. Selma Union High School Dist. (1924) 193 Cal. 54, 57-58; see Snowden v. Hughes (1944) 321 U.S. 1, 8-9.)

In 1959, the State Legislature took the first major steps toward eliminating racial discrimination in housing. The

Unruh Civil Rights Act (Civ. Code, §§ 51-52) prohibited discrimination on grounds of "race, color, religion, ancestry, or natural origin" by "business establishments of every kind." On its face, this measure encompassed the activities of real estate brokers and all businesses selling or leasing residential housing. (See Lee v. O'Hara (1962) 57 Cal.2d 476; Burks v. Poppy Construction Co. (1962) 57 Cal.2d 463.)

At the same session the Legislature passed the Hawkins Act (formerly Health & Saf. Code, §§ 35700-35741) that prohibited racial discrimination in publicly assisted housing accommodations. In 1961 the Legislature broadened its attempt to discourage segregated housing by enacting proscriptions against discriminatory restrictive covenants affecting real property interests (Civ. Code, § 53) and racially restrictive conditions in deeds of real property (Civ. Code, § 782).

[fol. 85] Finally in 1963 the State Legislature superseded the Hawkins Act by passing the Rumford Fair Housing Act. (Health & Saf. Code, §§ 35700-35744.) The Rumford Act provided that "The practice of discrimination because of race, color, religion, natural origin, or ancestry is declared to be against public policy" and prohibited such discrimination in the sale or rental of any private dwelling containing more than four units. The State Fair Employment Practice Commission was empowered to prevent violations.

Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market.

Prior to its enactment the unconstitutionality of Proposition 14 was urged to this court in Lewis v. Jordan, Sac. 7549 (June 3, 1964). In rejecting the petition for mandamus to keep that proposition off the ballot we stated in

our minute order "that it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls. . . ." But we further noted in the order [fol. 86] that "there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution. . . ." We are now confronted with those questions.

Plaintiffs' basic contention is that the foregoing provisions cannot constitutionally withstand the mandate contained in section 1 of the Fourteenth Amendment to the United States Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Thus, the constitutional proscription invoked is twofold. First, it is a limitation on state, as distinguished from private action and, second, it directs that such state action, where undertaken, meet certain minimum standards. If we assume for the moment that the state has undertaken to act in these circumstances, then the pertinent issue becomes whether such action accords equal protection of the laws to plaintiffs. We consider such issue initially.

It is now beyond dispute that the Fourteenth Amendment, through the equal protection clause, secures, without discrimination on account of color, race [or] religion, 'the right to *acquire* and *possess* property of every kind' . . ." (Buchanan v. Warley (1917) 245 U.S. 60, 62, emphasis added.) In Shelley v. Kraemer, 334 U.S. 1, the court expressed itself as follows at page 10: ". . . among the civil rights intended to be protected from discriminatory state [fol. 87] action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

(See also Brown v. Board of Education (1954) 347 U.S. 483; Barrows v. Jackson (1953) 346 U.S. 249; Jackson v. Pasadena City School Dist. (1963) *supra*, 59 Cal.2d 876; Sei Fujii v. California (1952) 38 Cal.2d 718.)

The question of the fact of discrimination, by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved. Thus, as a complete and only answer to plaintiffs' allegations which irrefutably establish a discriminatory act, defendants urge that section 26 accords them the right as private citizens to so discriminate. The only real question thus remaining is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is [fol. 88] sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment. For the reasons stated below we have concluded that state action is sufficiently involved to fall within the reach of the constitutional prohibition.

The parties generally concede that in an organized and regulated society the state or its subdivision play some part in most, if not all, so-called private transactions, and it must be acknowledged, without specifically enumerating them, that many of the rights and duties arising out of the transfer of an interest in real property are related to or dependent upon the state or local governments. But it is not the mere fact that in some manner the state is involved, however remotely, with which we are concerned. It is only where the state is significantly involved that the prohibitions of the equal protection clause are invoked. The Supreme Court in Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, stated the proposition in the

following language at page 722: ". . . private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have been involved in it." That proscribed state involvement is not to be limited to direct conduct on the part of its employees, agents and representatives is made apparent by the court's further statement at page 722: "Only by sifting facts and weighing circumstances can the nonobvious in- [fol. 89] volvement of the State in private conduct be attributed its true significance." More recently the Supreme Court has stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." (Evans v. Newton (1966) 382 U.S. —.)

However subtle may be the state conduct which is deemed "significant," it must nevertheless constitute action rather than inaction. The equal protection clause and, in fact, the whole of the Fourteenth Amendment, is prohibitory in nature and we are not prepared to hold, as has been urged, that it has been or should be construed to impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. Urged in support of such proposition is James v. Marinship Corporation, 25 Cal.2d 721. But the prior state commitment in that case is clear. We held that a so-called private labor union could not racially discriminate against those who wished to become members, but we first concluded that the union, because it had obtained a monopoly on the labor supply, was like a public service business which, under the law of the state, was precluded from discriminating on the basis of race. Likewise, in Jackson v. Pasadena City School Dist., *supra*, 59 Cal.2d 876, the state, because it had undertaken [fol. 90] through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools.

The problem thus becomes one of ascertaining positive state action of a degree sufficient to be deemed significant in the accomplishment of the recognized and admitted discrimination.

To conclude that there is state action in the instant circumstances we are not limited to action by one who, cloaked with the authority of the state, acts as its designated representative. In the broad sense, state action has been consistently found where the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purpose. Thus, state conduct has been found in the action of a trial court in enforcing a privately created restrictive covenant which prevented a sale of real property to a Negro buyer. (Shelley v. Kraemer, *supra*, 334 U.S. 1.) In that case the court stated at page 14: ". . . [T]he Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.'" In applying the *Shelley* reasoning that the processes of the court cannot be utilized to accomplish a private discrimination, it has been [fol. 91] held reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the defendant tenant was admittedly in default. (Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242.)

Shelley, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the *Shelley* and the *Abstract* cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate. The court is not asked to enforce a covenant

nor to eject a tenant, but only to render judgment denying the relief sought in accordance with the law of the state. Thus, it is contended by defendants that the isolated act of rendering such a judgment does not significantly involve the state in the prior act of discrimination.

It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the [fol. 92] significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests. (See Burton v. Wilmington Pkg. Auth., *supra*, 365 U.S. 715, 722.) Thus, in Marsh v. Alabama, 326 U.S. 501, an entire town was owned by a purely private company, the agents of which caused the arrest for trespass of persons engaged in exercising their constitutional freedom of speech. Although no governmental officials or agents were involved, the Supreme Court found sufficient state action to invoke the Fourteenth Amendment. This was based on the view that the company managers were performing a governmental function of managing and controlling a town wherein persons resided who were entitled to Fourteenth Amendment protections: ". . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, where held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . ." (Marsh v. Alabama, *supra*, at p. 509.) There, as contended by defendants in the instant case, the state did not participate except to condone private action.

Even more applicable in the instant circumstances are the so-called "white primary cases." (Smith v. Allwright, 321 U.S. 649; Terry v. Adams, 345 U.S. 461; Nixon v. Con- [fol. 93] don, 286 U.S. 73; Baskin v. Brown, 174 F.2d 391; Rice v. Elmore, 165 F.2d 387.) In those cases private action infringing the right to vote was held to be the equivalent of state action where accomplished with the culpable

permission of the state. In Nixon v. Condon, *supra,* 286 U.S. 73, for instance, a state statute which forbade voting by Negroes in primaries was declared to be unconstitutional. It was thereupon repealed and a substitute measure enacted which was wholly permissive, that is, political parties were allowed to prescribe the qualifications for membership and voting rights in the party's primaries. A local political party thereafter barred Negroes from voting in its primaries and it was held that the permissive private action was chargeable as state action. (See also Baskin v. Brown, *supra,* 174 F.2d 391, 394.)

A similar abdication of a traditional governmental function for the obvious purpose of condoning its performance under color of private action has recently been struck down by the Supreme Court in Evans v. Newton, *supra,* 382 U.S. ——. There, a park for the enjoyment of white persons was owned, managed and maintained by the City of Macon, Georgia, as trustee under the 1911 will of Senator August Bacon. When a question was raised whether the city could continue to maintain the segregated park consistent with the Equal Protection Clause, it purported to transfer the park to private trustees with the intent that it would con- [fol. 94] tinue to be maintained for the enjoyment of white persons only. The foregoing conduct on the part of the municipality was held to be proscribed by the Fourteenth Amendment.

It is contended by defendants, however, that the foregoing cases, in the main, involved some recognized governmental function which, although undertaken by private persons, nevertheless was required to be performed in the same non-discriminatory manner as would be required in the case of performance by the state. Such contention fails to recognize the basic issue involved. Those cases are concerned not so much with the *nature* of the function involved as they are with *who* is responsible for conduct in performance of that function. If the function is traditionally governmental in nature unquestionably the state is responsi-

ble. But this cannot be the only instance wherein the state assumes responsibility—it is also responsible when, as we have stated, it becomes significantly involved in *any* discriminatory conduct. (See Burton v. Wilmington Pkg. Auth., *supra,* 365 U.S. 715, 722.)

Going to the question of what constitutes significant involvement, it is established that even where the state can be charged with only encouraging discriminatory conduct, the color of state action nevertheless attaches. Justice Black, in writing for the majority in Robinson v. Florida, 378 U.S. 153, 156, and for the dissenters in Bell v. Mary-[fol. 95] land, 378 U.S. 226, 334, asserted that private racial discrimination violated the Fourteenth Amendment once the state in any way discourages integration or instigates or encourages segregation. In Barrows v. Jackson, *supra,* 346 U.S. 249, in holding that a racially restrictive covenant could not constitutionally support a suit for damages, the court explained at page 254: "The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages."

Proscribed governmental encouragement of private discrimination has not been confined to the courts. Anderson v. Martin, 375 U.S. 399, involved racial labeling of candidates on ballots. Although the state practice did not *require* discrimination on the part of individual voters, it was struck down because it *encouraged* and assisted in discrimination. (See also Baldwin v. Morgan, 287 F.2d 750.) Similarly, as early as 1914, in McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151, it was stated at page 162 that the denial of equal railroad facilities to Negroes by a private railroad was unconstitutional state action on the ground

[fol. 96] that the right to discriminate was authorized by a local statute and that should the carrier perpetrate such discrimination it would be acting under "the authority of a state law." The court reasoned that state *authorization* to discriminate was no less state action than state *imposed* discrimination. (See also Boman v. Birmingham Transit Company, 280 F.2d 531.)

The Supreme Court has recently spoken out against state action which only authorizes "private" discrimination. In Burton v. Wilmington Pkg. Auth., *supra,* 365 U.S. 715, the court had before it the question of whether the State of Delaware discriminated against a Negro who was excluded from a privately-operated restaurant leased from a public agency of that state. The court stated at page 725 that the state "not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . ." In a concurring opinion Justice Stewart, concluding that the state enactment involved, as construed by the state court, *authorized* discrimination, stated at page 727: "I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid." Even the dissenting [fol. 97] justices agreed that if the state court had construed the state enactment as authorizing racial discrimination, there was a denial by the state of equal protection of the laws, Justice Frankfurther stating at page 727: "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment."

In a case involving a fact situation similar to *Burton,* and clearly pertinent to our present inquiry, a Tennessee statute renounced the state's common law cause of action

for exclusion from hotels and other public places and declared that operators of such establishments were free to exclude persons for any reason whatever. In the particular circumstances of that case the statute was deemed to bear on the issues "only insofar as" it "expressed an affirmative state policy fostering segregation." The court stated that: "our decisions have foreclosed any possible contention that such a statute . . . may stand consistently with the Fourteenth Amendment." (Turner v. City of Memphis (1962) 369 U.S. 350, 353.)

The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make [fol. 98] possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of dscrimination itself. Where the state can be said to act, as it does of course, through the laws approved by legislators elected by the popular vote, it must also be held to act through a law adopted directly by the popular vote. When the electorate assumes to exercise the law-making function, then the electorate is as much a state agency as any of its elected officials. It is thus apparent that, while state action may take many forms, the test is not the novelty of the form but rather the ultimate result which is achieved through the aid of state processes. And if discrimination

is thus accomplished, the nature of proscribed state action must not be limited by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality. [fol. 99] Contrary to defendants' claims, the state's abstinence from making the decision to discriminate in a particular instance does not confer upon it the status of neutrality in these circumstances. Justice Byron R. White's view of the facts in Evans v. Newton, supra, 382 U.S. —, poses an almost identical issue to that here presented. In his view the majority in *Evans* were not justified on the record in concluding that the City of Macon was continuing to operate and maintain the park there involved after transfer to private trustees, and he grounded his conclusion of proscribed state action on 1905 legislation which did not compel but would nevertheless make it possible for the maintenance of segregated private parks for either white or colored persons. His reasoning and resolution of the issue are stated at page — in the following language: "As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of that racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restrictions, leaving the validity of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by [fol. 100] enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment."

From the foregoing it is apparent that the state is at least a partner in the instant act of discrimination and that

its conduct is not beyond the reach of the Fourteenth Amendment.

The question remains whether section 26 in whole or in part must be struck down. It is argued, and with merit, that in many applications no unconstitutional discrimination will result and, as noted, it is specifically provided in the amendment that "If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." Does such severability clause save the amendment for piecemeal judicial scrutiny as specific instances of its application arise?

We have recognized that a statute which has unconstitutional applications may nevertheless be effective in those [fol. 101] instances where the Constitution is not offended. (See Franklin Life Ins. Co. v. State (1965) 63 A.C. 221.) In the *Franklin* case a taxing statute was held to have been properly applied despite the "possibility of hypothesizing an unconstitutional application of the statute." (P. 226.) But in refusing to declare the statute unconstitutional on its face, we stated at page 227: " . . . [W]hen the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute [citations]. We have been particularly aware of fomenting such danger of uncertainty in the application of a statute which would inhibit the exercise of a constitutional right (*In re Blaney, supra*) or impose criminal liability. . . . As the United States Supreme Court has said in rejecting an argument that a statute violative of the Fifth Amendment could be constitutionally applied to the case before it, such a 'course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.' [Citations.]" (See also Thornhill v. Ala-

bama, 310 U.S. 88; Carlson v. California, 310 U.S. 106; Jones v. Opelika, 319 U.S. 103.)

The instant case, of course, relates directly to the personal liberties distinguished in *Franklin*. This was also true in the case of In re Blaney (1947) 30 Cal.2d 643, re- [fol. 102] ferred to in *Franklin*. In the *Blaney* case the "Hot Cargo Act," which declared secondary boycotts unlawful, was struck down on the ground that in some instances sympathetic strikes and other labor coercion could not be constitutionally restrained, although it was recognized that in other instances the statute could be lawfully applied. The court held that the provisions of the statute did not differentiate between the constitutional and unconstitutional applications, stating that "The only way in which such segregation could be made would be by judicial interpretation, first holding that the act as it stands is wholly unconstitutional, but then determining that, by inserting qualifications and exceptions in the statutory language, a judicially reformed statute might be given some effect." (In re Blaney, *supra*, 30 Cal.2d 643, 655.) We further held in *Blaney* that a severability clause is ineffective to sustain valid portions or applications of a statute unless ". . . the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words," and that where the statute is not so severable ". . . then the void part taints the remainder and the whole becomes a nullity." (P. 655.)

It is immediately apparent from the operative portion of the instant constitutional amendment that it is mechanically impossible to differentiate between those portions or [fol. 103] applications of the amendment which would preserve the right to discriminate on the basis of race, color or creed, as distinguished from a proper basis for discrimination. The purported preservation of the right to discriminate on whatever basis is fully integrated and, under the rule on *Blaney*, not severable. Moreover, while we

can conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist, any such other purpose clearly "entails the danger of an uncertain or vague future application of the [enactment]" and would thus require that it be struck down. (Franklin Life Ins. Co. v. State (1965) 63 A.C. 221, 227.)

For the foregoing reasons the severability clause is ineffective in the instant case, and the whole of the constitutional amendment must be struck down.

Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Four- [fol. 104] teenth Amendment to the federal Constitution, and is void in its general application.

The judgment is reversed.

Peek, J.

We Concur: Traynor, C. J., Peters, J., Tobriner, J., Burke, J.

[fol. 105]

DISSENTING OPINION OF WHITE, *J.* TO OPINION OF PEEK, *J.*

I dissent.

In the final analysis as I view it, the primary issue here presented is whether article I, section 26,[1] added to our state Constitution by the people as an initiative measure (Proposition 14) at the general election of November 3, 1964, by a vote of 4,526,460 to 2,395,747, is a valid exercise of state legislative power in choosing not to regulate the private conduct of residential property owners in the sale or rental of their own private property, even if that

[1] For convenience this section of the Constitution will be referred to as section 26.

conduct is discriminatory on racial or religious grounds, or whether such a legislative choice by the people violates the provisions of the Fourteenth Amendment to the Constitution of the United States or federal law.

[fol. 106] While the attack in the briefs on the constitutionality of section 26 encompasses some highly emotional and, I feel, inaccurate charges as to its scope, meaning and effect, such as that by its adoption California has taken "affirmative action of a definite and drastic sort . . . [amounting] to condonation or approval of race discrimination in the sale, leasing and rental of housing . . . "; that it is an "affirmative declaration that the State will never do anything to prevent or eliminate that discrimination"; that it puts "the State in direct opposition to national policy"; and that its effect is "not merely to repeal the Unruh and Rumford Acts but to authorize racial discrimination in the renting of residential property," I am impressed, from a calm and dispassionate reading of section 26, that it is manifest that actually the measure amounts only to a legislative choice by the people acting through the power reserved to them by article IV, section 1, of our California Constitution that a particular method of attempting to solve the problem of housing for minorities, i.e., the imposition of governmental sanctions on *private residential property owners* shall not now be employed; that the state policy which existed in California prior to 1959 shall be restored; and that there be reserved to the people the exclusive legislative power to change or modify this policy.

[fol. 107] Prior to the adoption of the Unruh Act, the California Legislature had chosen not to regulate the conduct of property owners in selecting their buyers or tenants whether or not the choice was based on race, color or creed. By the enactment of the Unruh Act in 1959, the Legislature chose to regulate racial and religious discrimination by persons in "business establishments of every kind whatsoever," including persons engaged in the business of selling

or renting residential property, brokers and others. (Burks v. Poppy Construction Co., 57 Cal.2d 463, 468; Lee v. O'Hara, 57 Cal.2d 476, 478.) From September 1963, until section 26 of article I became effective, by enacting the Rumford Act, the Legislature chose to regulate specifically such discriminating conduct by owners of most but not all residential property. Then, in November 1964, by enacting section 26 of article I of the Constitution, the people exercised their legislative prerogative and declared that the conduct of a private property owner in refusing to sell or rent his property for whatever reason, should not be regulated by the state but should be left to private self-determination, but the legislation regulating persons other than the property owner when dealing with his own property was left in full force. Nor did the adoption of section 26 interfere with or impair the nearly century-old history [fol. 108] of legislation affecting race relations in California commencing as it did in 1872 with the enactment of legislation prohibiting innkeepers and common carriers from discriminating in making their facilities available to all races and creeds (now Pen. Code, § 365), legislation which prohibited discrimination in "public accommodations" (Stats. 1893, ch. 185, p. 220). Those provisions which became sections 51-54 of the Civil Code in 1905 and were amended in 1919 and 1923 (Stats. 1919, ch. 210, p. 309; Stats. 1923, ch. 235, p. 485) guaranteed to "All citizens . . . full and equal accommodations . . . of inns, restaurants, hotels, eating houses . . . barber shops, bath houses, theatres, skating rinks, public conveyances, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." Then in 1925 and succeeding years followed statutory prohibitions against race discrimination in the employment of teachers in California school districts, in civil service, in public works employment, and assistance programs for needy and distressed persons.

In 1959 the Legislature enacted a measure popularly known as the "Hawkins Act" (Health & Saf. Code. §§ 35700-35741) which prohibited "The practice of discrimination [fol. 109] because of race, color, religion, national origin or ancestry in any *publicly assisted housing accommodations*. . . . " (Emphasis added.) Also adopted at the 1959 legislative session was the California Fair Employment Practice Act (Lab. Code, §§ 1410-1432) prohibiting racial discrimination by certain employers and labor unions, thereby protecting and safeguarding the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, creed, color, national origin or ancestry. None of these guarantees against racial discrimination have been modified or impaired by the challenged constitutional amendment now engaging our attention.

In 1963 the Legislature, in enacting what is commonly known as the "Rumford Act" (Health & Saf. Code, §§ 35700-35744), chose to broaden the policy enunciated in the Hawkins Act, *supra,* with regard to discrimination in housing by extending the provisions of the Unruh and Hawkins Acts to regulate specifically discriminating conduct not only by persons in business establishments of every kind whatsoever, including persons engaged in the business of selling or renting residential property, brokers and others, but regulating such discriminatory conduct by owners of residential property containing more than four units even though not "publicly assisted." It was this [fol. 110] latter declared public policy only that was affected by the adoption of section 26.

I am impressed that charges made in the briefs of plaintiffs and amicus curiae that the measure here under consideration was prompted by vicious motives cannot be sustained as against the clear language of the measure itself and the argument that was made to all the voters who cast their ballots at the election.

To discriminate means, insofar as applicable to the instant case, "To make a difference in treatment or favor

(of one as compared with others)"; discrimination means ". . . an unfair or injurious distinction." (Webster's New Internat. Dict. (2d ed. 1954).) Contrary to the statutes and laws struck down because of racial discrimination in the cases relied upon by the majority, article I, section 26, now before us, grants equal rights and protection of the law to *any person without regard to race, religion or color,* to sell, lease or rent residential real property to *any person as he chooses.* Where is there discrimination or denial of equal rights to all in this enactment?

But, says the majority opinion, "It is now beyond dispute that the Fourteenth Amendment [Constitution of the United States], through the equal protection clause, se- [fol. 111] cures 'the right to *acquire* and *possess* property of every kind . . . without discrimination on account of color, race [or] religion. . . .' (Buchanan v. Warley (1917) 245 U.S. 60, 62-63.) . . . The question of the fact of discrimination by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

The answer to that is that section 26 does not sanction or condone racial or religious discrimination. It is rather a declaration of neutrality in a relatively narrow area of human conduct: the exercise of the discretion of a property owner to sell or not to sell or to rent or not to rent his residential property.

Since it is conceded that "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment" (Civil Rights Cases, 109 U.S. 3, 11), it seems to me that any sound analysis of the constitutionality of section 26 must begin with the well established, but frequently ignored, premise that the prohibitions of the Four-

[fol. 112] teenth Amendment are directed at *conduct for which the state is responsible or significantly involved* and do not extend to private conduct however wrongful, discriminatory, unethical or violative of what may be regarded by many as the real philosophy of human relations. In other words, the state must be held *responsible* for denying a citizen the equal protection of the law.

The major constitutional attack on section 26 as contained in the majority opinion would seem to begin with the fallacious assumption of the existence of a federal constitutional right to acquire property without racial discrimination from another citizen and leaps to the conclusion that the failure of the state to enforce that *constitutional right* inevitably involves the state in the constitutionally prohibited discrimination so significantly as to violate the Fourteenth Amendment. Nothing in the federal Constitution gives to one citizen the right to acquire property from another citizen who does not wish to sell it to him even if the refusal to sell is based on race or religion. A federal constitutional right arises only if the state is responsible for such discriminatory conduct or to some significant extent has been found to have become involved in it.

[fol. 113] I am persuaded that in the absence of significant state involvement, the refusal of a property owner to sell or lease his property upon the grounds of race raises no federal constitutional question. As declared by the United States Supreme Court in the leading case of Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 722 [6 L.Ed.2d 45]: "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some *significant extent* the state in any of its manifestations has been found to have become *involved* in it." (Emphasis added.)

And as was said by Mr. Justice Harlan in his concurring opinion in Peterson v. Greenville (1963) 373 U.S. 244, 249-250 [10 L.Ed.2d 323, 327], "The ultimate substantive

question is whether there has been 'State action of a particular character' (*Civil Rights Cases, supra* [109 U.S. at 11])—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

"This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: [fol. 114] liberty and equality. *Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference.* This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. *Also inherent in the concept of State action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.*" (Emphasis added.)

And since section 26, here in question, involves *residential* property, the views of Mr. Justice Douglas in his concurring opinion in Lombard v. Louisiana, 373 U.S. 267 at pp. 274-275 [10 L.Ed.2d 338, at p. 343] (one of the 1963 sit-in decisions) are cogent:

"If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment [fol. 115] with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amend-

ment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter a private precinct they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence."

Plaintiffs urge that the Constitution of California (article I, section 1) declares that among the inalienable rights guaranteed to all persons is the right of ". . . acquiring, possessing and protecting property." But these rights not only include the right to acquire and possess property but also the right to dispose of it freely (Tennant v. John Tennant Memorial Home, 167 Cal. 570, 575) and in any way not forbidden by law (People v. Davenport, 21 Cal. App.2d 292, 295-296). Certainly the constitutional right to own and possess property includes the right to sell to one of the owner's own choice subject only to a valid exercise of the police power for the protection of all the people. Never to my knowledge has article I, section 1, of our state Constitution been construed to give any per- [fol. 116] son the right to acquire property from another who did not wish to sell it to him, however arbitrary his reasons might be. Section 1 of article I, when read with section 26, now means exactly what it meant prior to the adoption of legislation (the Unruh and Rumford Acts, *supra*) conferring a right to acquire property in certain instances without discrimination on grounds of race or religion. It is, therefore, erroneous for plaintiffs to say that the effect of section 26 is to "take from negroes but not from whites, some part of the inalienable rights granted by section 1." Under section 26 all persons of all races and creeds have exactly the same rights they have always had under section 1 in the absence of legislation and, to the extent any rights are restricted by section 26, such restrictions are applicable to *all* persons.

As I view it, the philosophy and rationale of article I, section 26, is epitomized by Mr. Justice Black, long an exponent of an expansive interpretation of the guarantees of the Fourth Amendment, when writing for himself and Justices Harlan and White in the dissent filed in the case of Bell v. Maryland (1964) 378 U.S. 226, 330-331 [84 S.Ct. 1814, 12 L.Ed.2d 822, 858] wherein he said: ". . . the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing [fol. 117] to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to 'inherit, purchase, lease, sell, hold and convey' property, prohibits a State, whether through its Legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley* v. *Kraemer, supra,* 334 U.S., at 19 [92 L.Ed. at 1183, 3 A.L.R.2d 441]. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' (*Buchanan* v. *Warley, supra,* 245 U.S., at 74 [62 L.Ed. at 161, L.R.A. 1918C 1201]). *This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses NOT to sell to a particular person or NOT to admit that person,* as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of law, that is 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant [fol. 118] to some constitutional grant of power, can anyone disturb this free use." (Emphasis added.)

As to the view of the majority that affording a property owner judicial recognition and enforcement of his

property rights in the sale or leasing of residential property, on the ground that his motives in selling or leasing were based upon race, color or creed, spells out significant state involvement is not, I submit, supported by statutory or decisional law. This I say because such denial, *in the absence of a valid regulatory statute,* would deprive such an owner of his property without due process of law because a property owner, as heretofore pointed out, has a constitutionally protected right to use and dispose of his property in whatever manner he wishes, not inconsistent with valid legislation. (Buchanan v. Warley (1917) 245 U.S. 60 [62 L.Ed. 149]; Richmond v. Deans (1930) 281 U.S. 704 [74 L.Ed. 1128].)

In other words, since section 26 does not otherwise offend the Fourteenth Amendment, the mere recognition or enforcement by a court of—for instance—the termination of a month-to-month tenancy in accordance with its terms does not render the state responsible for the motives of the landlord.

[fol. 119] In the instant case it is clear that section 26 has effectively repealed inconsistent portions of the Unruh and Rumford Acts, *supra.* Plaintiffs are, therefore, in the position of demanding that the courts refuse to recognize or actually prohibit conduct by defendants which is not now proscribed by any legislation.

When the Legislature adopted the Unruh, Hawkins and Rumford Acts, it was making a choice to impose sanctions upon certain owners of certain types of residential property if they refused to sell or lease it upon grounds of race, color, creed or national origin of the prospective purchasers. Certainly it cannot logically be contended that the Legislature would be barred from repealing those portions of the aforesaid statutes directing sanctions at private property owners in dealing with their own property and substitute therefor another program. If the Legislature has such discretion, then under the Constitution of this state, it cannot fairly be said that the people do not.

I am persuaded that none of the types of state involvement which have been held sufficient to invoke the Fourteenth Amendment in the cases relied upon in the majority opinion can be found in the California amendment here under attack. In fact, the very essence of section 26 is to remove the influence of the state from the formulation of [fol. 120] private decisions affecting the sale or rental of privately owned residential property.

Plaintiffs seemingly contend and the majority opinion infers that all conduct which the state has the power to prohibit but which it does not prohibit is conduct for which the state is responsible for Fourteenth Amendment purposes. However, the Supreme Court of the United States has consistently and without exception preserved the fundamental and long recognized principle that the Fourteenth Amendment does not reach private conduct however arbitrary or unenlightened it may be except only where such private conduct involves the performance of a traditional governmental or public function such as the conducting of elections, government of a town, the furnishing of public services under a monopoly granted by government, private zoning through restrictive covenants or operation of municipal parks. There is no suggestion in the cases now before us that the residential property involved is or ever has been owned, operated, financed or maintained by a governmental entity. Here the property is private residential property owned, operated and maintained by the private persons who were defendants in the court below.

Accordingly, the precise holding of the Supreme Court of the United States in the recent case of Evans v. Newton [fol. 121] (1966) —— U.S. ——, 34 U.S.L.Week 4078, based as it was on the continued municipal operation and maintenance of the property devoted to public use as a park, affords no comfort or support whatever to the attack on section 26. Just as the statute in Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L.Ed.2d 45, could not provide the basis for a violation of the Fourteenth Amend-

ment, so also section 26 does not provide the basis for a judgment that plaintiffs' constitutional rights have been violated.

Admittedly, since government is not an exact science, one of the important factors deserving consideration concerning existing evils and the remedy therefor is prevailing public opinion. This is especially true when such public opinion has been reached after mature deliberation and is both deep-seated and widespread. By an overwhelming margin of popular votes, the people of California have made the same choice on the issue before us as has been made in 32 of our sister states, and our state still has more extensive regulations against racial discrimination than exist in 41 states of the union.

To analyze in detail the recent U.S. Supreme Court decision in Evans v. Newton, *supra,* would unduly prolong this already lengthy dissenting opinion. Suffice it to say that it is the most recent of a long line of United States [fol. 122] Supreme Court decisions dating from the *Slaughter-House* cases in 1873 and *Civil Rights* cases in 1883 in which that court has steadfastly limited the sphere of the Fourteenth Amendment to conduct of the state or conduct for which the state can fairly be held responsible. In an unbroken line of decisions that court has uniformly reiterated the principle that individual invasion of individual rights is beyond the regulatory ambit of the Fourteenth Amendment.

I do not justify discriminatory private conduct nor approve the state's failure to forbid it, but I submit it is not the province of this court by judicial fiat to enact legislation, a function reserved to the People or the Legislature.

As was stated by Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Douglas, in Bell v. Maryland, *supra* (1964) 378 U.S. 226 at p. 313 [12 L.Ed.2d 822], arguing for a federal right to equal access to public accommodations which the state may not infringe by judicial action against trespassers: *"Prejudice and bigotry in any form are regrettable, but it is the constitutional right of*

every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association [fol. 123] *are themselves constitutionally protected liberties.*" (Emphasis added.)

Discrimination because of race or religion, political beliefs or other irrational grounds influences the conduct of individuals and society in many ways with as many effects. In virtually all but the *artificially framed racial* test case, such discriminations will, if present, be but one of many motivating factors. This, because we must realize that an innate quality of our very nature is that of selectivity. It manifests itself in our human behavior from the time we attain the use of reason practically until we draw our final breath. If, as conceded by plaintiffs in their briefs and at the oral arguments, and recognized in the majority opinion, we may be selective in choosing our associates in clubs, fraternal organizations, social intimates and business partners because of social or religious prejudice, then by what force of logic or justice should the state be permitted to assert its coercive powers to take from the individual property owner the decision as to who shall be admitted to that property as a resident neighbor or to whom the owner thereof may sell it, save by the law of the land? Yet, this is exactly what the state would be doing in denying to a [fol. 124] property owner judicial recognition and enforcement of his private contract and property rights upon the ground that his motives in seeking judicial relief are based upon race, color or creed. By reason of the repeal of certain provisions of the Rumford and Unruh Acts by the enactment of section 26, there is no valid existing regulatory statute depriving an owner of residential property of absolute discretion in the sale or rental thereof. Therefore, since a property owner has a constitutionally protected right to dispose of and use his property in whatever manner he wishes *not inconsistent with valid legislation*, to deny such owner judicial relief would deny to him the

equal protection of the laws in violation of the First, Third, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The majority opinion relies upon the case of Shelley v. Kraemer, 334 U.S. 1 [92 L.Ed. 1161] as being analogous to the one with which we are here concerned. In *Shelley*, property subject to a racially restrictive covenant had been conveyed by a white owner to a Negro. Owners of a nearby property instituted an action to restrain Shelley, the Negro buyer, from taking possession, and to have title revested in the grantor. This case involved a "willing seller—willing buyer" relationship, and judicial enforcement of the [fol. 125] restrictive covenant would have compelled the sellers to discriminate against their wishes. If the *Shelley* case stands for anything, it stands for the philosophy of section 26, by sustaining the freedom of sellers to select whomsoever they choose to buy their property, notwithstanding racial covenants. The key to both *Shelley* and Barrows v. Jackson, 346 U.S. 249 [97 L.Ed. 1586, 73 S.Ct. 1031] (affirming Barrows v. Jackson, 112 Cal.App.2d 534), where the courts refused to recognize a right to damages in neighboring property owners seeking recovery after breach of a racially restrictive covenant by a willing seller to a minority group buyer, is that, were the courts to give recognition to such a cause of action they would not be acting neutrally but actually would be compelling discrimination by a seller who did not wish to discriminate.

Neither case supports the proposition that a state court would have been under a constitutional mandate to compel an owner to sell to a Negro if he preferred to adhere voluntarily to his restrictive agreement. Indeed, the court in *Shelley* expressly concluded "that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment." (334 U.S. at p. 13.) Later it noted that "*these are cases in which the States have made available to* [fol. 126] *such individuals the full coercive power of government to deny to petitioners, on the grounds of race or*

color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." In short, "but for the intervention of the state courts, . . . petitioners would have been free to occupy the properties in question without restraint." (334 U.S. at p. 19.) (Emphasis added.)

Plaintiffs' arguments and the majority opinion based on the *Shelley* case simply do not apply to the cases now before this court where an unwilling seller or lessor is involved. As pointed out in *Shelley*, the court there was asked to enforce an agreement which denied to members of one race rights of acquisition, ownership, occupancy and disposition of property rights that were enjoyed as a matter of course by other citizens of a different race or color. Article I, section 26, of the California Constitution, now before us, applies to property owners without regard to race or color and, accordingly, the conduct condemned in the foregoing cases is not present here.

In support of its holding that a discriminatory act even where the actor is a private citizen motivated by purely personal interests, may fall within the proscription of the equal protection clause if state or local government or the [fol. 127] purpose of state or local government is significantly involved, the majority opinion herein cites the case of Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 722 [6 L.Ed.2d 45]. This is a leading example of those cases presenting circumstances in which the state has leased state facilities either in whole or in part to a private person or group for carrying on activities or offering services to the public which the government may, but is not obligated to provide.

In *Burton*, the court found significant state involvement in restaurant discrimination because the land and building were publicly owned and had been acquired for "public use." The premises were leased to a private operator but as a part of a publicly owned parking lot where the rental income from the restaurant was necessary for the financial stability of the parking operation.

The *Burton* case and those akin to it simply hold that if a state undertakes to provide or contribute to providing these services, it must obey the strictures of the Fourteenth Amendment, whether the state itself operates the facilities or limits its activities to leasing or financing the facilities operated by private persons but performing the same services.

[fol. 128] None of the elements of state involvement present in the *Burton* case—the "white primary" cases where the holding was that the state could not escape the provisions of the Fourteenth Amendment by delegating to a private agency functions which were inherently governmental in character; or the so-called "sit-in" cases involving either municipal ordinances requiring racial discrimination, where the court emphasized that it *was not* confronted with a private policy of discrimination or with mere enforcement by a state court of a state criminal trespass statute, but where the state invoked the statute to promote racial discrimination—is possible under the California constitutional provision here under attack. The very essence of section 26 is to avoid state involvement in private decisions in the sale or rental of privately owned residential property.

Plaintiffs rely on the case of Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242, cited in the majority opinion. In this case, the District Court of Appeal reversed a judgment for the plaintiff in an unlawful detainer action on the ground that the trial court had erred in refusing to admit evidence in support of certain affirmative defenses which alleged that plaintiff was terminating the tenancy solely because of the Negro defendant's race. As indicated by excerpts on pages 247 through 251 of the *Abstract* case, [fol. 129] the court was holding that under the law *as it then existed* racial discrimination was a ground for a court refusing to entertain or sustain a complaint for unlawful detainer because racial discrimination was contrary to the public policy declared inter alia in our state Constitution and in the Unruh and Hawkins Acts adopted by our state Legislature.

The extent of the significance attached by the District Court of Appeal to these state laws is reflected in its extensive discussion at pages 251 through 255 of the opinion concerning the constitutionality and applicability of these statutes.

To the extent that the court in *Abstract* relied upon state antidiscrimination legislation it should not be applied to cases such as the instant one involving as it does the leasing of residential property because of non-regulation by the state embodied in section 26. Likewise, to the extent *Abstract* was based upon the public policy provisions of the state Constitution, the holding was overruled by the adoption of section 26, here under attack insofar as the sale or leasing of residential property is concerned.

As I view it, another important issue presented to us is whether in the several states a person has a right of action [fol. 130] under the Fourteenth Amendment to obtain judicial relief against another person who refuses on grounds of race to deal with him in the sale or leasing of private residential property. If he has such a right of action, then I agree that neither section 26, nor any statute, decision of any court, nor any vote of the electorate can properly deny it.

Also, I certainly agree that conduct based on racial prejudice is injurious, that it is irrational, uncharitable, unenlightened and arbitrary. What I disagree with is the essential foundation of plaintiffs' claim that racial discrimination practiced by private owners of private residential housing is directly forbidden by the Fourteenth Amendment. However delicately or artfully plaintiffs phrase the problem, whether in terms of "state responsibility" for not prohibiting what it has the power to prohibit, or of "abdication of state responsibility" or of "purposefully permitting," "authorizing" or "encouraging" discriminatory conduct, none of these words is so magic as to obscure the plain fact that the only conduct which has injured these plaintiffs is the conduct of private citizens with respect to their own private residential prop-

erty. I submit the state cannot fairly be held responsible for that conduct unless it has a duty under the Fourteenth [fol. 131] Amendment to prohibit such conduct, and that a state has that duty only if the Fourteenth Amendment contains a self-executing cause of action for racial discrimination in private housing.

No single case relied upon by plaintiffs or cited in the majority opinion holds or even suggests that there is such a cause of action under the Fourteenth Amendment. On the contrary, the authorities are unanimous in holding that no such federal constitutional cause of action now exists, that the Fourteenth Amendment does not extend and that sound reasons forbid its extension to the private conduct here involved.

Furthermore, recourse to the legislative history and debates in the Congress at the time the Fourteenth Amendment was under consideration clearly establishes that the amendment was designed to correct the unjust legislation of some of the states to the end that the law which operates upon one man shall operate equally upon all. This legislative history indicates that the purpose of the amendment was to prohibit *state* legislation such as was adopted in some of the states following the Civil War preventing Negroes from purchasing or leasing land, buying or selling other property or even making contracts precisely as by the federal Constitution, a state is forbidden to pass an "ex post facto law."

[fol. 132] The Thirteenth Amendment had just been adopted inhibiting slavery but leaving the freedom of the emancipated people in the power of the states. Hence the necessity of the prohibition to the states. By the very language of the amendment it is manifest that its entire structure rests on the discrimination made by laws of the various states.

In an area concerned solely with the rights and obligations of citizens toward each other, the people have a right either directly or through their elected representatives to regulate that kind of conduct or not to regulate it.

The adoption of section 26 of the Constitution of California evidences the decision of the people not to regulate such conduct in the sale or leasing of private residential property and extends such freedom of action to all persons, unrestricted by racial or religious barriers.

I would affirm the judgment.

White, J.*

[fol. 133]

DISSENTING OPINION, MCCOMB, J.

I concur with the views expressed by Mr. Justice White in his dissenting opinion.

The people of California, under the legislative power reserved to them (Cal. Const., art. IV, § 1)[1] have, by enacting section 26 of article I, guaranteed to all persons, regardless of race, color or religion, equal rights in their property.

Every person, regardless of his race, color or religion, as an incident of the right to own, possess and enjoy real property, has the right to sell or lease, or to decline to sell or lease, his property to anyone regardless of the race, color or religion of the person with whom he is dealing.

[fol. 134] Unless we are to become a socialistic state in which the people have only limited, if any, rights to privately own, possess, enjoy and/or dispose of property, real or personal, the proposed decision is obnoxious to our basic form of government.

The people of California, by enacting section 26, article I, of the Constitution, have made it altogether clear that

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* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[1] Article IV, section 1, reads: "The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature."

they wish to retain the right to own, possess and enjoy private ownership of property.

By its decision, our court has effectively nullified the will of the people, from whom it derives its power.

I completely disagree with the majority that the subject enactment encourages discriminatory conduct. To me, section 26 is a restatement of a fundamental principle that all property owners have a right to enjoy or to dispose of their property in any lawful manner, in their absolute discretion.

McComb, J.

[fol. 135]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 28422

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs and Cross-Defendants, Respondents,

vs.

CLARENCE SNYDER, Defendant and Cross-Complainant, Appellant.

Excerpts From Clerk's Transcript

Appeal from the Superior Court, Los Angeles County.

Honorable Martin Katz, Judge.

APPEARANCES:

Messrs. A. L. Wirin and Fred Okrand, 257 South Spring Street, Los Angeles, California 90012, Counsel for Respondents.

Messrs. Gibson, Dunn & Crutcher and Samuel O. Pruitt, Jr., 634 South Spring Street, Los Angeles, California 90014, Counsel for Appellant.

[fol. 136]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs,

v.

CLARENCE SNYDER, Defendant.

COMPLAINT FOR INJUNCTION—Filed December 23, 1964

Plaintiffs allege:

I

Plaintiffs Wilfred J. Prendergast and Carola Eva Prendergast are husband and wife. Plaintiff Wilfred Prendergast is a Negro. Plaintiff Carola Prendergast is a Caucasian. They bring this action on behalf of themselves and all persons similarly situated, namely, persons who are discriminated against by defendant because of their race or the race of their spouses by the policy of defendant as hereinafter set forth.

II

Defendant Clarence Snyder is the owner of that certain apartment known as 8604 Burton Way, Los Angeles, California. Said apartment is one of a seven apartment unit having the addresses 8602-8612 Burton Way, Los Angeles, [fol. 137] California, owned by defendant and rented by him to tenants.

[File endorsement omitted]

III

On or about July 13, 1964, defendant, through Mrs. Margaret Keefer, a Realtor with offices at 842 S. Robertson Blvd., Los Angeles, California, acting as agent of and for and on behalf of defendant, rented to plaintiffs the apartment described in Paragraph II hereof, and a garage for use in connection therewith. The negotiations were conducted between Mrs. Keefer and plaintiff Carola Prendergast. At the time of the renting, plaintiff Carola Prendergast advised Mrs. Keefer, and Mrs. Keefer, as agent for and on behalf of defendant, knew that her, plaintiff Carola Prendergast's, husband was working in San Francisco, California and would join her to live in the apartment as soon as he received a transfer from his employer to come to Los Angeles. At the time of the renting, defendant nor his agent, Mrs. Keefer, did not know that plaintiff Wilfred Prendergast was a Negro.

IV

Plaintiffs, at all times herein have paid the rent on time. Until the times mentioned below, plaintiff Carola Prendergast occupied the apartment alone.

V

During the month of October, 1964, plaintiff Wilfred Prendergast was temporarily in Los Angeles and stayed at the above mentioned apartment. While there, he met the said Mrs. Keefer while she was collecting the rent, was introduced to her by plaintiff Carola Prendergast as the husband of plaintiff Carola Prendergast and the said Mrs. Keefer saw that plaintiff Wilfred Prendergast is a Negro.

VI

In November, 1964, plaintiff Wilfred Prendergast moved to Los Angeles and into the said apartment where, since that time, he has been and is now living with his wife.

[fol. 138]

VII

Thereafter defendant caused to be served on plaintiffs a Notice to Quit, dated December 1, 1964, demanding that plaintiffs quit and deliver up possession of the said apartment to defendant on December 31, 1964. Said Notice to Quit is referred to herewith, incorporated herein as though fully set forth and a copy thereof attached hereto as Exhibit "A".

VIII

By letter dated December 7, 1964 and sent by registered mail, plaintiffs requested of defendant, through his agent Mrs. Keefer, that they be given reasons in writing as to why they were being required to quit the premises. Said letter and the return receipt signed by Mrs. Keefer are referred to herewith, incorporated herein as though fully set forth and copies thereof attached hereto as Exhibit "B".

No reply has been received to said letter.

IX

The sole reason why defendant has served upon plaintiffs the Notice to Quit and is requiring plaintiffs to quit the premises is that plaintiff Wilfred Prendergast is a Negro.

X

Plaintiffs are informed and believe and therefore allege that the reason defendant did not serve a Notice upon them to quit the premises prior to the said December 1, 1964 notice is because of the requirements of California Civil Code Sections 51 and 52 which prohibited him from so doing, but that following the addition of Article I, Section 26 to the California Constitution (Proposition 14 on the ballot of November 3, 1964 California General Election) he served said notice. Plaintiffs are further informed and be-

lieve and therefore allege that defendant now has the policy and intends to maintain that policy as a practice, not to rent or permit occupancy of any of the apartments in the apartment building described in Paragraph II hereof by Negroes.

[fol. 139]

XI

Unless restrained by this Court, defendant will cause plaintiffs to be evicted from the said premises and will refuse to rent to other persons solely because they are Negroes.

XII

Plaintiffs have no plain, speedy or otherwise adequate remedy at law. The remedy of damages will not make them whole for the loss suffered by them in being required to move from the home in which they desire to live nor will it allow them to live in the home of their choice.

Wherefore, plaintiffs pray:

1. For a preliminary injunction, pending final determination of this case, restraining and enjoining defendant and his agents from, pursuant to the Notice to Quit dated December 1, 1964, or by reason of plaintiff Wilfred Prendergast's race, evicting plaintiffs from the premises at 8604 Burton Way, Los Angeles, California, and from engaging in the practice of discrimination because of race in the rental of apartments in the apartment building at 8602-8612 Burton Way, Los Angeles, California.

2. For a permanent injunction restraining and enjoining defendant and his agents from, pursuant to the Notice to Quit dated December 1, 1964 or by reason of plaintiff Wilfred Prendergast's race, evicting plaintiffs from the premises at 8604 Burton Way, Los Angeles, California, and from engaging in the practice of discriminating because of race in the rental of apartments in the apartment building at 8602-8612 Burton Way, Los Angeles, California.

3. For costs of suit incurred herein.

4. For such other and further relief as to the Court may seem just and proper.

A. L. Wirin, Fred Okrand, Attorneys for Plaintiffs.

O/s

[fol. 140] EXHIBIT "A" TO COMPLAINT

NOTICE TO QUIT

To Mr. and Mrs. Wilfred Pendergast Tenant in Possession. TAKE NOTICE, that you are hereby required to quit, and deliver up to the undersigned the possession of the premises now held and occupied by you, being the premises known as 8604 Burton Way Los Angeles, 49, Calif. at the expiration of 30 Days commencing on the 1st day of December, 1964 and ending on the 31st day of December, 1964.

THIS IS INTENDED as a 30 Day notice to quit, for the purpose of terminating your tenancy aforesaid.

DATED this 1st day of December, 1964

/s/ CLARENCE SNYDER
Landlord.

/s/ MARGARET KEEFER
Agent.

[fol. 141] EXHIBIT "B" TO COMPLAINT

December 7th, 1964

M. Keefer—Realtor
842 S. Robertson Blvd.
Los Angeles, Calif.

Re: Your "NOTICE TO QUIT" dated December 1st, 1964.

Dear Mrs. Keefer:

We hereby request that you submit to us, in writing, within five (5) days, your reason or reasons for requiring us to quit the premises now held and occupied by us at 8604 Burton Way, Los Angeles, Calif.

Very sincerely,

W. Prendergast
8604 Burton Way
Los Angeles, Calif.

Via Registered Mail
12-7-64

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Deliver *ONLY* to addressee ☐ Show address where delivered

(Additional charges required for these services)

RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must be always filled in)
/s/ M. KEEFER

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED
Dec 8 1964

SHOW WHERE DELIVERED *(only if requested)*

[fol. 142]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[Title omitted]

ORDER TO SHOW CAUSE—Filed December 23, 1964

Upon the reading and filing of the verified complaint herein, and good cause appearing therefor, It Is Hereby Ordered, that defendant Clarence Snyder, show cause in Department 65 of this Court, 111 North Hill Street, Los Angeles, California, at the hour of 9:30 a.m. on Jan. 8 1965, why a preliminary injunction, pending final determination of this case, should not be issued restraining and enjoining him and his agents from evicting plaintiffs, Wilfred J. Prendergast and Carola Eva Prendergast, pursuant to Notice to Quit dated December 1, 1964, or by reason of plaintiff Wilfred Prendergast's race, from the premises at 8604 Burton Way, Los Angeles, California and from engaging in the practice of discriminating because of race in the rental of apartments in the apartment building at 8602-8612 Burton Way, Los Angeles, California.

Dated: December 23, 1964.

Harold F. Collins, Judge, Superior Court.

O/s

[File endorsement omitted]

[fol. 143]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851,387

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs,

vs.

CLARENCE SNYDER, Defendant.

CLARENCE SNYDER, Cross-Complainant,

vs.

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Cross-Defendants.

NOTICE OF MOTIONS OF DEFENDANT AND CROSS-COMPLAINANT FOR SUMMARY JUDGMENT—Filed January 27, 1965

To The Plaintiffs And Cross-Defendants Herein And Their Attorneys Of Record, A. L. Wirin And Fred Okrand:

You And Each Of You Will Please Take Notice that on February 17, 1965 in Department 65 of the above-entitled Court at the hour of 9:00 A.M. or as soon thereafter as counsel may be heard, Defendant and Cross-Complainant will move the Court for summary judgment dismissing the said Complaint herein and granting to Cross-Complainant the relief prayed for in said Cross-Complaint.

[File endorsement omitted]

[fol. 144] Said motions will be made and based upon the grounds:

1. That the action set forth in the Complaint herein has no merit in that defendant is entitled as a matter of law, to a judgment of dismissal of the same.

2. That there is no defense to the action set forth in the said Cross-Complaint and that Cross-Complainant is entitled as a matter of law to a judgment against Cross-Defendants in accordance with the prayer of said Cross-Complaint.

3. There is no triable issue of fact material to the grounds for said motions as hereinabove set forth.

Said motions will be made and based upon this Notice of Motion, upon the verified Cross-Complaint herein, upon the Declaration of Defendant and Cross-Complainant filed concurrently herewith, upon a brief to be filed herein in support of said motions and upon all the papers and records on file herein.

Dated: January 27, 1965.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel Pruitt, Jr., Attorneys for Defendant and Cross-Complainant.

[fol. 145]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851,387

[Title omitted]

DECLARATION OF CLARENCE W. SNYDER

I, Clarence W. Snyder, do hereby declare under penalty of perjury that the following is true and correct:

1. I am the defendant and cross-complainant in this action. I know the facts set forth in this declaration and in

the cross-complaint herein and if called as a witness could testify competently thereto.

2. As an investment, the subject Burton Way property has hardly paid its own way. In 1963, our Rental Income was $7,575.00 while our required cash payments were $8,585.40, leaving a cash deficiency of $1,010.40. In 1964 our Rental Income was $5,815.00 and our required cash payments $7,968.10, leaving a cash deficiency of $2,153.10. I refer to and by this reference incorporate herein as though set forth in full Schedules A and B below. These schedules are an accurate breakdown of the rentals received and expenditures made in connection with the Burton Way property for the years 1963 and 1964, respectively.

[fol. 146] 3. The apartment building has one apartment which rents for $110 a month, three which rent for $100 a month, two which rent for $90 a month, and one (sometimes referred to as a half unit or bachelor apartment) which rents for $65 a month. At full occupancy and at the present rates, the gross rentals are $655 a month.

4. The tenants occupying the bachelor apartment, one of the $90 a month apartments, and one of the $100 a month apartments, all under month-to-month tenancies have all told us that they will vacate their apartments if the Prendergasts do not leave. If these tenants do vacate, our Rental Income will be cut by $255 a month until the apartments can be filled again. Our past experiences have indicated that it is reasonable to anticipate that it will take at least five months to fill each of these apartments. With the Burton Way apartment already in a negative cash position, so many prolonged vacancies would cause me severe economic loss and would make it impossible for me to continue to meet the expenses and mortgage payments set forth in the schedules which follow.

Schedule A

1963

Rental Income		$7,575.00
Expenses		
Utilities	$ 217.62	
Auto Expense	120.00	
Property Management	423.25	
Gardening	257.75	
Mortgage Interest	1,593.57	
Taxes	1,226.02	
[fol. 147]		
Insurance	200.41	
License and Permits	22.00	
Rug and Furniture Cleaning	42.06	
Repairs, Plumbing and Heating	387.45	
Electric	37.16	
Painting	216.71	
Furniture and Hardware	123.97	
Roofing	899.00	
Maintenance and General Repair	212.00	
	$5,978.97	
Mandatory Principal Mortgage Payments	2,606.43	
		8,585.40
Cash Deficiency		($1,010.40)

Schedule B

1964

Rental Income		$5,815.00
Expenses		
Utilities	$ 217.74	
Auto Expense	105.00	
Property Management	428.75	
Gardening	250.00	
Mortgage Interest	1,124.85	
Taxes	1,250.58	
Insurance	185.00	
License and Permits	22.00	
Rug and Furniture Cleaning and Repair	145.00	
Plumbing	84.25	
[fol. 148]		
Electric	8.70	
Painting	571.00	
Maintenance and General Repair	288.00	
Tile Repairs	105.00	
Doors and Windows	107.08	
	$4,892.95	
Mandatory Principal Mortgage Payments	3,075.15	
		7,968.10
Cash Deficiency		($2,153.10)

Executed this 13th day of January, 1965, in the City of Los Angeles, County of Los Angeles, State of California.

Clarence W. Snyder

[fol. 149]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851,387

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs,

vs.

CLARENCE SNYDER, Defendant.

CLARENCE SNYDER, Cross-Complainant,

vs.

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Cross-Defendants.

CROSS-COMPLAINT FOR DECLARATORY RELIEF—
Filed January 27, 1965

Defendant and Cross-Complainant Clarence W. Snyder [hereinafter "Cross-Complainant"] hereby alleges:

1. Cross-Complainant is and at all times material hereto has been an owner of that certain six and one-half unit apartment building having the addresses 8602-8612 Burton Way, Los Angeles, California, which building includes that certain apartment known as 8604 Burton Way, Los Angeles, California.

2. Cross-Defendants are presently residents of the county [fol. 150] of Los Angeles and are occupying the apartment known as 8604 Burton Way, Los Angeles, California.

[File endorsement omitted]

3. Cross-Defendants Wilfred J. Prendergast and Carola Eva Prendergast are husband and wife. Cross-Defendant Wilfred J. Prendergast is a Negro. Cross-Defendant Carola Eva Prendergast is a Caucasian. They are served and sued herein on behalf of themselves and all persons similarly situated, namely, persons who are or claim to be discriminated against by Cross-Complainant because of their race or the race of their spouses by the policies adopted by Cross-Complainant in the management of the apartment building referred to above.

4. Cross-Complainant and his wife purchased the apartment building referred to herein as an investment and to occupy one of the apartments as a future home. It was and is their intention to move into said property as soon as they can obtain a manager for another property they own. Accordingly, they have always felt it most important that the tenants in the building should be selected so that they will be able to live together harmoniously and consist of only such persons as Cross-Complainant would desire to have as neighbors.

5. Cross-Defendants took possession of the apartment they now occupy under a month-to-month tenancy commencing August 1, 1964. Cross-Defendant Carola Eva Prendergast has occupied said apartment since on or about August 1, 1964, and Cross-Defendant Wilfred J. Prendergast has occupied said apartment since in or about November, 1964.

6. Cross-Complainant exercised the right conferred on him by Section 1946 of the California Civil Code, namely, the right to terminate the monthly tenancy of Cross-Defendants, by serving on them a Notice to Quit, dated December 1, 1964, demanding that Cross-Defendants quit and deliver up possession of said apartment to Cross-Complainant on December 31, 1964. A true and correct [fol. 151] copy of said Notice to Quit is attached hereto, marked Exhibit "A", and incorporated herein by reference.

7. Prior to the termination of the tenancy of Cross-Defendants, as hereinabove alleged, Cross-Complainant was

advised by tenants of three of the remaining six apartments in the subject apartment building that each of them would exercise their rights to terminate their month-to-month tenancies if Cross-Complainant did not terminate the tenancy of Cross-Defendants because said other tenants did not desire to live in the same apartment building with Cross-Defendants.

8. Cross-Complainant does not desire to live in the subject apartment building so long as Cross-Defendants occupy the subject apartment and at the present time Cross-Complainant does not desire to rent any of said apartments to Negroes.

9. Cross-Complainant terminated the subject tenancy in the exercise of what he believed to be his rights (1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, and (2) to acquire, use, enjoy and dispose of his property in any manner he may choose which is not prohibited by statute, ordinance or other legislation.

10. There exists an actual controversy between Cross-Complainant and Cross-Defendants over the existence, nature and extent of Cross-Complainant's right to terminate the tenancy of Cross-Defendants Prendergast and to regain possession of the apartment known as 8604 Burton Way, Los Angeles, California, in that Cross-Complainant contends and Cross-Defendants deny as follows:

A. There is no federal, state or local statute, ordinance or legislation which renders invalid or unlawful Cross-Complainant's termination of Cross-Defendants' monthly tenancy in the manner specified herein.

B. In the absence of a federal, state or local statute, [fol. 152] ordinance or legislation to the contrary, Cross-Complainant's refusal to permit any person or persons to become a tenant in his apartment building

or his termination in the manner provided by law of the tenancy of any person or persons in that building is not unlawful even if the unexpressed reason for such refusal or termination is the race or religion of such person or persons.

C. Cross-Defendants' monthly tenancy and right to occupy the apartment they continue to occupy has been lawfully terminated, and Cross-Complainant is entitled to immediate possession of the premises.

D. Cross-Complainant has a right to have a court of law recognize and enforce the termination of Cross-Defendants' tenancy in the manner set forth above and his right to regain possession of the premises formerly subject to said tenancy even if Cross-Complainant's sole reason for so terminating and for seeking such court recognition of the same were the race of Cross-Defendant Wilfred J. Prendergast.

Wherefore, Cross-Complainant prays that the Court make a Declaratory Judgment in accordance with the contentions of Cross-Complainant as set forth in paragraph 10 hereof, that Cross-Complainant recover his costs incurred herein, and have such other and further relief as may to the Court seem just and proper.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel O. Pruitt, Jr., Attorneys for Defendant and Cross-Complainant.

[fol. 153]

EXHIBIT "A" TO CROSS COMPLAINT

NOTICE TO QUIT

To Mr. and Mrs. Wilfred Pendergast

Tenant in Possession.

TAKE NOTICE, that you are hereby required to quit, and deliver up to the undersigned the possession of the premises now held and occupied by you, being the premises known as 8604 Burton Way Los Angeles, 49, Calif.

at the expiration of 30 Days commencing on the 1st day of December, 1964 and ending on the 31st day of December, 1964.

THIS IS INTENDED as a 30 Day notice to quit, for the purpose of terminating your tenancy aforesaid.

DATED this 1st day of December, 1964

/s/ CLARENCE SNYDER
Landlord.

/s/ MARGARET KEEFER
Agent.

[fol. 154]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[Title omitted]

DECLARATION OF MRS. MARGARET H. KEEFER—
Filed February 16, 1965

I, MRS. MARGARET H. KEEFER, do hereby declare under penalty of perjury that the following is true and correct:

[File endorsement omitted]

1. I have for many years been a realtor in the city of Beverly Hills. I am currently an active member in good standing of the Beverly Hills Realty Board.

2. Since the spring of 1961 I have been managing the seven unit apartment building known as 8602-8612 Burton Way, Los Angeles, California, for the owners, Mr. and Mrs. Clarence W. Snyder.

3. For about three and one-half years ending February 14, 1965, Mrs. Margaret O'Brian occupied the apartment in said building known as 8602 Burton Way.

4. On several occasions since the Prendergasts moved into the Snyder's building, Mrs. O'Brian has told me that if the Prendergasts did not leave, she would vacate. [fol. 155] Finally, on or about the first of February, 1965, Mrs. O'Brien told me that since the Prendergasts had not left, she was going to vacate her apartment on February 14.

5. On February 14, 1965, Mrs. Margaret O'Brien vacated her apartment.

6. The apartment vacated by Mrs. O'Brien has not been rented to any new tenant as yet, and I presently know of no persons interested in renting the apartment while the Prendergasts continue to occupy another apartment in the building.

7. The apartment known as 8610 Burton Way is now and for some time has been occupied by Mr. and Mrs. Charles Newton as tenants. Early in December, Mr. and Mrs. Newton telephoned me to complain about the Prendergasts. When they took their apartment they did not know that Mr. Prendergast was a Negro. Mrs. Newton told me at that time that they didn't know this was a neighborhood with so many colored people in it. She said there were many Negroes coming in and out of the Prendergast apartment, particularly on weekends, and that if the Prender-

gasts didn't leave, the Newtons would. She has repeated that statement on numerous occasions since that time.

8. On February 1, 1965, I received written notice from Charles Newton that he and his wife were vacating their apartment in the Snyder building as of March 1, 1965. They have told me that they are vacating the apartment because they don't want to live or have their friends know they live in a building occupied by Negroes.

9. I know of my own knowledge that all of the facts set forth in all of the preceding paragraphs are true and correct.

Executed this 16th day of February, 1965, in the city [fol. 156] of Los Angeles, county of Los Angeles, State of California.

Mrs. Margaret H. Keefer

[fol. 157]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Date: Mar. 15, 1965

Hon. Martin Katz, Judge, Helen Bennett, Deputy Clerk, J. Valley, Deputy Sheriff, Alma Ziegler, Reporter.

(Parties and counsel checked if present)

815937

THOMAS ROY PEYTON, M.D.

vs.

BARRINGTON PLAZA CORPORATION

851387

WILFRED J. PRENDERGAST, et al.

vs.

CLARENCE SNYDER

Counsel for Plaintiff

Saul S. Kreshek√ for plff Peyton

Counsel for Defendant

Malat and Malat and Ned B. Nelsen by Ned B. Nelsen√ for deft Barrington Plaza

MINUTE ENTRY OF MARCH 15, 1965

Plaintiff Thomas Roy Peyton's motion for preliminary injunction;

Defendant Barrington Plaza's Motion for Judgment on the Pleadings;

Plaintiff Wilfred J. Prendergast's Motion for Preliminary Injunction;

Defendant Clarence Snyder's Motion for Summary Judgment.

These matters having been submitted on March 3, 1964, the court now renders its decision, with all counsel present as shown above:

815937: Plaintiff Thomas Roy Peyton's motion for preliminary injunction is denied. Defendant Barrington Plaza's motion for Judgment on the Pleadings is denied as to counts 1 and 2, and granted as to count 3; ruling is deferred on count 4. Counsel for defendant Barrington Plaza Corporation is directed to prepare Judgment on the order granting motion for judgment as to count 3.

851387: Plaintiff Wilfred J. Prendergast's motion for preliminary injunction is denied. Defendant Clarence Snyder's motion for summary judgment is denied.

Helen Bennett

[fol. 158]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Plaintiffs,

vs.

CLARENCE SNYDER, Defendant.

MEMORANDUM OF DECISION—March 15, 1965

Plaintiffs, who are husband and wife, occupy an apartment under a month-to-month tenancy in a seven unit

[File endorsement omitted]

apartment building owned by defendant. Their tenancy commenced August 1, 1964, and on December 1, 1964, they were served with a 30 day notice pursuant to Section 1946 of the Civil Code requiring them to quit and deliver up possession of the premises to defendant. The sole reason for defendant's decision to terminate the tenancy was that plaintiff husband is a Negro.

This action was brought by plaintiffs to enjoin defendant landlord from evicting them because of race. Defendant has cross-complained for declaratory relief. He seeks a judicial declaration that plaintiffs' tenancy and right of occupancy has been lawfully terminated even if racial discrimination was the reason therefor, that defendant is entitled to immediate possession of the premises, and that he is entitled to have a court recognize and enforce termination of plaintiffs' tenancy and restoration of the premises to him even if he is motivated solely by racial prejudice.

Defendant made a motion for a summary judgment dismissing plaintiffs' action and granting him the relief requested in his cross-complaint. Affidavits have been filed indicating that another tenant has vacated her apartment and others will do so if plaintiffs remain because those tenants do not want to live in a building occupied by a [fol. 159] Negro, and projecting an economic loss to defendant if plaintiffs do not vacate the premises.[1] Defendant's motion for summary judgment, together with plaintiffs' application for a preliminary injunction, has been submitted for decision.

In opposition to defendant's motion and in support of their own, plaintiffs rely on the Unruh Civil Rights Act which, among other things, prohibits racial discrimination in the rental of real property in certain circumstances.[2]

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[1] The cross-complaint similarly alleges that although defendant intended to live in the building in the future, he does not want to do so if a Negro continues in occupancy.

[2] Civil Code, Sec. 51, provides: "All persons . . . . are free and equal, and no matter what their race, color, ... are entitled to

Defendant, in turn, relies upon Section 26, Article I, of the California Constitution,[3] which if valid, admittedly repeals the Unruh Act insofar as the latter imposes sanctions on [fol. 160] the owners of real property who discriminate on the basis of race or color in the rental thereof.[4] Defendant contends that there is now no statutory or common law cause of action in California against a property owner for his refusal to rent or to permit continued occupancy of his property, whatever his motives, and, accordingly, that there is no legal impediment to his evicting plaintiffs on grounds of race. Plaintiffs counter with the contention that Section 26 of Article I is invalid by reason of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[5] They further contend that judicial enforcement of defendant's decision to terminate plaintiffs' tenancy on racial grounds would deny

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the full and equal accommodations . . . . in all business establishments of every kind whatsoever." Section 52 states that "whoever denies . . . . or makes any discrimination . . . . on account of color, race . . . . contrary to the provisions of Section 51 . . . . is liable . . . . for damages.

Swann v. *Burkett*, 209 Cal. App. 2d 685, holds that an apartment building such as that involved herein is a "business establishment" within Section 51.

[3] "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly the right of any person, who is willing or desirous to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

Section 26, Article I, was known as Proposition 14 on the ballot at the last General Election.

[4] Other anti-discriminatory housing legislation, such as the Rumford Act (Health & Safety Code, Secs. 35700-35744), would also be repealed.

[5] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

plaintiffs rights guaranteed them by the Equal Protection Clause. Inasmuch as the latter contention has merit, it is unnecessary to consider the former.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits racial discrimination by the state, but it does not prohibit such offensive conduct by a private individual "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." (Burton v. Wilmington Parking Authority, 365 U.S. 715; Peterson v. Greenville, 373 U.S. 244; Shelley v. Kraemer, 334 U.S. 1; Civil Rights Cases, 109 U.S. 3.) It has been held that the prohibited involvement occurs when a state court enforces the racial-discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (Shelley v. Kraemer, supra; Barrows [fol. 161] v. Jackson, 346 U.S. 249; Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242; *cf.* In re Laws, 31 Cal. 2d 846; Clifton v. Puente, 218 S.W. 2d 272 (Texas); State v. Brown, 195 Atl. 2d 379 (Dela.).) *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242, specifically holds that judicial enforcement of the eviction of a tenant on racial grounds is prohibited by the Equal Protection Clause. There, a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. The tenant's attempt to set up the defense that he was being evicted because of race was denied by the trial court. The District Court of Appeals reversed, holding that the tenant should have been permitted to show racial discrimination by his landlord "which if proven would bar the court from ordering his eviction because such 'state action' would be violative of" the federal Constitution. (Supra, p. 255).

It would seem that the decision in the *Abstract* case is determinative of the present case. However, defendant

contends that case is not controlling because, he claims, it represents an erroneous interpretation or misapplication of decisions of the United States Supreme Court in the restrictive covenant cases, principally *Shelley* v. *Kraemer*, 334 U.S. 1, and *Barrows* v. *Jackson*, 346 U.S. 249. Those cases held that the Equal Protection Clause interdicts judicial enforcement by state courts of restrictive covenants directed against use or occupancy of real property by non-Caucasians. The *Shelley* case involved an action in equity to enforce such a covenant by enjoining a Negro purchaser from occupying the purchased property. The *Barrows* case involved an action for damages against a white vendor for breach of covenant in selling to a Negro. Defendant argues that since the *Shelley* and *Barrows* cases involved willing sellers and buyers, judicial enforcement of the racial restrictive covenants therein would have compelled sellers [fol. 162] to discriminate against their wishes, and that the Supreme Court decisions in those cases must, therefore, be limited to situations where the 'state action' coerces the private decision to discriminate. The facts and language in Shelley and Barrows, as well as in subsequent cases, would appear to challenge the limitation contended for by defendant.[6] Although state action which coerces discrimination by private individuals in unquestionably prohibited,

[6] The private decisions to discriminate which were sought to be enforced in Shelley and Barrows long antedated the 'state action'. In *Shelley* v. *Kraemer*, the Court stated: "Here the particular patterns of discrimination and the areas in which restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement." The opinion in *Barrows* v. *Jackson*, 112 Cal. App. 2d 534, summarized Shelley v. Kraemer as follows: "The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation."

it appears that state participation in or active support of a prviate policy of racial discrimination, which participation or support does not have the effect of coercing the private decision to discriminate, is equally prohibited. (Burton v. Wilmington Parking Authority, 365 U.S. 715; Penn. v. Board of Trusts, 353 U.S. 230; Griffin v. Maryland, 378 U.S. 130; *cf.* Marsh v. Alabama, 326 U.S. 501; Cooper v. Aaron, 358 U.S. 1; Simkins v. Mose H. Cone Memorial Hospital, 323 F. 2d 959; Jackson v. Pasadena School District, 59 Cal. 2d 876.)[7]

[fol. 163] But regardless of whether or not the decision of the District Court of Appeal in *Abstract Investment Co.* v. *Hutchinson,* supra, is sound, this court is required to follow it in the absence of contrary decisions by state appellate courts of equal or greater authority or by the United States Supreme Court. No such state court decisions have been cited.[8] A number of recent decisions of the United States Supreme Court arising out of the "sit-in" demonstrations have been cited by defendant in support of his contention that judicial enforcement by state courts of private racial discrimination does not of itself constitute prohibited state action. The fact is that none of those decisions so hold. The cases relied upon are *Peterson* v. *Greenville,* 373 U.S. 244, *Lombard* v. *Louisiana,* 373 U.S.

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[7] In *Griffin* v. *Maryland,* supra, it was said: "The Board of Trust case must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

[8] *Housing Authority* v. *Cordova,* 130 Cal. App. 2d 883, which states by way of dictum that a landlord may refuse "to permit the continued occupancy of his premises by persons of a particular race," is an opinion of the Appellate Department of the Los Angeles Superior Court, and, does not discuss the constitutional question. *Hill* v. *Miller,* which holds that judicial enforcement of a tenant's eviction on grounds of race does not violate the Fourteenth Amendment, is an opinion of the Sacramento Superior Court, and, makes no reference, in this connection, to the *Abstract* case.

267, *Griffin* v. *Maryland*, 378 U.S. 130, and *Robinson* v. *Florida*, 378 U.S. 158, each of which reversed state criminal trespass convictions of persons who were denied service in or equal access to places of public accommodation and who refused to leave the private premises when requested. Although the state action condemned in each of those cases was legislative, executive or administrative,[9] no approval of the judicial activity was indicated. The [fol. 164] Supreme Court has expressly abstained from determining "whether the Fourteenth Amendment . . . . operates of its own force to bar criminal trespass convictions where . . . . they are used to enforce a pattern of racial discrimination" in places of public accommodation.[10]

Defendant's attempt to distinguish the *Abstract* case on the basis that it "could have been decided" on the ground that the conduct of the landlord therein was in violation of the Unruh Act must also fail. The opinion of the Dis-

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[9] In *Peterson* v. *Greenville*, supra, prohibited state involvement was found in the existence of a city ordinance which required segregation in eating places. In *Lombard* v. *Louisiana*, supra, public statements by city officials that attempts to secure desegregated service were not in the public interest and would not be permitted constituted the offending state action. In *Griffin* v. *Maryland*, supra, state participation or involvement resulted from enforcement of a private amusement park's policy of discrimination by an employee of the park who was also a deputy sheriff. In *Robinson* v. *Florida*, supra, regulations of the board of health requiring separate restroom facilities where white and colored persons were accommodated were held to have involved the state in the private discrimination.

[10] Hamm v. Rockhill, —— U.S. ——, 13 L. Ed 2d 300. See also Robinson v. Florida, 378 U.S. 158; Garner v. Louisiana, 368 U.S. 157; Bell v. Maryland, 378 U.S. 226. But see State v. Brown, 195 Atl 2d 379 (Dela).

It is true that three members of the Supreme Court, Justices Harlan, Black and White, are of the opinion that such convictions are permissible. See dissenting opinion of Justice Black in Bell v. Maryland, supra. But three other members, Chief Justice Warren, Justices Douglas and Goldberg, are of the contrary opinion. See concurring opinions of Justice Douglas and Justice Goldberg in Bell v. Maryland, supra.

trict Court of Appeal in that case expressly stated that it could not find "that the discrimination complained of constituted a violation of the Unruh Act." (204 Cal. App. 2d 242, 255)

Finally, defendant contends that to refuse judicial enforcement of a landlord's decision to terminate a tenancy because he is motivated by racial discrimination, would deny him due process and equal protection of the laws. A similar contention was rejected in *Shelley* v. *Kraemer* with the remark that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." (Supra at p. 22; See also Barrows v. Jackson, supra; Abstract Investment Co. v. Hutchinson, supra at p. 251)

[fol. 165]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CONTINUATION OF PROCEEDINGS OF 3-15-65

Defendant's motion for judgment on the pleadings is granted as to count 4. The court further orders that the complaint be, and it hereby is dismissed without prejudice, and that the cross-complaint be, and hereby is, dismissed with prejudice. The clerk is ordered to file the judgment this date and have entered on the register of actions soon as possible.

Jack Franz

[fol. 166]

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., 634 South Spring Street, Los Angeles, California 90014, MAdison 0-9300, Attorneys for Defendant and Cross-Complainant.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851 387

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST on behalf of themselves and all persons similarly situated, Plaintiffs,

—vs.—

CLARENCE SNYDER, Defendant.

CLARENCE SNYDER, Cross-Complainant,

—vs.—

WILFRED J. PRENDERGAST, and CAROLA EVA PRENDERGAST on behalf of themselves and all persons similarly situated, Cross-Defendants.

JUDGMENT—March 31, 1965

The motions of defendant and cross-complainant for summary judgment on the Complaint and Cross-Complaint having come on regularly for hearing on March 3, 1965, in Department 62 of the above Court, the Honorable Martin Katz, Judge presiding, Messrs. Herman F. Selvin, A. L. Wirin, and Fred Okrand appearing for plaintiffs and cross-defendants and Messrs. Gibson, Dunn & Crutcher and Samuel O. Pruitt, Jr. appearing for defendant and cross-complainant, and the Court having considered the briefs

and arguments of counsel, and the parties having agreed [fol. 167] that there is no genuine issue as to any facts material to a disposition of the motions, and the Court being fully advised in the premises, having determined that Section 26 of Article I of the California Constitution is inapplicable to the issues raised by the Cross-Complaint herein and that to grant any relief on said Cross-Complaint would violate the Fourteenth Amendment to the United States Constitution and that said Cross-Complaint must therefore be dismissed with prejudice and the parties having agreed that the Complaint may be dismissed without prejudice, now therefore

It Is Hereby Ordered, Adjudged, and Decreed that the Complaint be, and it hereby is, dismissed without prejudice, and that the Cross-Complaint be, and it hereby is, dismissed with prejudice.

Martin Katz, Judge of the Superior Court.

Approved as to content and form without prejudice however to right to cross-complainant to appeal from said judgment:

Herman F. Selvin, A. L. Wirin, Fred Okrand, By Fred Okrand, Attorneys for Plaintiffs and Cross-Defendants.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel O. Pruitt, Jr., Attorneys for Defendant and Cross-Complainant.

[fol. 168]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[Title omitted]

NOTICE OF APPEAL—Filed April 1, 1965

To the Clerk of the above-entitled Court:

Please Take Notice that cross-complainant Clarence Snyder hereby appeals to the Supreme Court of California from the judgment of the Court dismissing the Cross-Complaint herein, entered April 1, 1965, and the whole thereof.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel O. Pruitt, Jr., Attorneys for Cross-Complainant and Appellant.

[File endorsement omitted]

[fol. 169]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST et al., Plaintiffs, Cross-defendants and Respondents,

v.

CLARENCE SNYDER, Defendant, Cross-complainant and Appellant.

OPINION—May 10, 1966

Defendant landlord appeals from a judgment for plaintiff tenants entered upon defendant's motion for summary judgment on his cross-complaint for declaratory relief.

[File endorsement omitted]

Plaintiffs Prendergast are husband and wife, respectively a Negro and a Caucasian. Prior to their marriage Mrs. Prendergast rented from defendant an apartment in his seven-unit dwelling on an oral, month-to-month tenancy. Mr. Prendergast moved into the apartment with his wife following their marriage, and defendant thereupon purported to terminate plaintiffs' tenancy in the exercise of his claimed right "(1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under [fol. 170] the same roof, and (2) to acquire, use, enjoy and dispose of his property in any manner he may choose which is not prohibited by statute, ordinance or other legislation."

The instant action was commenced by plaintiffs to enjoin defendant from evicting them by reason of plaintiff husband's race. In his cross-complaint defendant sought a declaration that his termination of the tenancy was not invalid, that defendant is entitled to possession of the premises, that his refusal to rent to any particular person or persons or terminate such rental would not be unlawful even if his unexpressed reason therefor was the race or religion of the person or persons involved, and that defendant has a right to have a court of law recognize and enforce the termination of plaintiff's tenancy. Defendant relies upon article I, section 26 of the Constitution, which provides in pertinent part: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

[fol. 171] The trial court, in a memorandum opinion, held that the Fourteenth Amendment, through the equal protection clause, proscribed discrimination based on race where directly practiced by a state and also if practiced by private persons where "to some significant extent the State

in any of its manifestations has been found to have become involved in it," citing Burton v. Wilmington Parking Authority, 365 U.S. 715, and Shelley v. Kraemer, 334 U.S. 1. The court then noted that "the prohibited involvement occurs when a state court enforces the racial discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (Shelley v. Kraemer, *supra*; Barrows v. Jackson, 346 U.S. 249; Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242....)"

In the *Abstract Investment Co.* case a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. A judgment for plaintiff was reversed on the ground that it was prejudicial error to deny defendant an opportunity to show that he was being evicted solely because of his race. The court held in that case that if defendant could have proved racial discrimination "it would bar the court from ordering his eviction because [fol. 172] such 'state action' would be violative of" the federal Constitution. (Abstract Investment Co. v. Hutchinson, *supra*, 204 Cal.App.2d 242, 255.)

The trial court in the present case concluded that it was bound by the *Abstract Investment Co.* case and, further, that if article I, section 26, which was adopted following the decision in that case, could be construed as requiring a court to enforce a landlord's decision to evict a tenant because of race, it could not be given that effect for federal constitutional reasons.

Although it appears that the instant case is factually indistinguishable from the *Abstract Investment Co.* case, we are not required to rely upon that case in affirming the judgment herein. We have held today that article I, section 26, upon which defendant relies for the declaration of his rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (Mulkey v. Reitman, *ante*,

p. ——.) For that reason, as well as those relied upon by the trial court, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

Peek, J.

We Concur:

Traynor, C. J., Peters, J., Tobriner, J., Burke, J.

[fol. 173]

L. A. 28422

PRENDERGAST,

v.

SNYDER.

DISSENTING OPINION OF WHITE, J.

To

OPINION OF PEEK, J.

I dissent.

For the reasons stated in my dissent in Mulkey v. Reitman, *ante*, p. ——, I would reverse the judgment.

White, J.*

I Concur: McComb, J.

[fol. 173a] Petition for rehearing in both cases (omitted in printing).

---

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[fol. 174]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LINCOLN W. MULKEY et al.,
Plaintiffs and Appellants,

v.

NEIL REITMAN et al.,
Defendants and Respondents.

MODIFICATION OF OPINION—June 8, 1966

By the Court:

The opinion herein, appearing in 64 A.C. 557, is modified by striking the paragraph beginning at the bottom of page 563 and ending at the top of page 564 and substituting in lieu thereof the following:

> It is now beyond dispute that " . . . among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." (Shelley v. Kraemer, 334 U.S. 1, 10; see also Buchanan v. Warley (1917) 245 U.S. 60, 62; Brown v. Board of Education (1954) 347 U.S. 483; Barrows v. Jackson (1953) 346 U.S. 249; Jackson v. Pasadena City School Dist. (1963) supra, 59 Cal.2d 876; Sei Fujii v. State of California (1952) 38 Cal.2d 718.)

Mosk, J., did not participate.

[File endorsement omitted]

[fol. 175]

Order Due June 9, 1966.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

No. 28360

MULKEY et al.,

v.

REITMAN et al.

ORDER DENYING REHEARING—June 8, 1966

White, J., sitting pro tempore in place of Mosk, J., who deemed himself disqualified.

Opinion Modified.

Respondents' petition for rehearing Denied.

McComb, J., and White, J., are of the opinion that the petition should be granted.

Traynor, Chief Justice.

[File endorsement omitted]

[fol. 176]
[Stamp—Filed—Jun 8 1966—William I. Sullivan, Clerk, By Bishel, O. F. Deputy.]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PRENDERGAST et al.,

v.

SNYDER.

White, J., sitting pro tempore in place of Mosk, J., who deemed himself disqualified.

ORDER DENYING PETITION FOR REHEARING—June 8, 1966

Respondents' petition for rehearing Denied.

McComb, J., and White, J., are of the opinion that the petition should be granted.

Traynor, Chief Justice.

[fol. 177] Clerk's Certificates (omitted in printing).

[fol. 178]

SUPREME COURT OF THE UNITED STATES

No. 483—October Term, 1966

NEIL REITMAN, et al., Petitioners,

v.

LINCOLN W. MULKEY, et al.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 5, 1966

FILED
AUG 25 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of California in *Mulkey, et al. v. Reitman, et al.* and *Prendergast, et al. v. Snyder,* which became final in the Court below upon denial of rehearings on June 8, 1966.

Citations to Opinions Below.

The majority opinion of the Supreme Court of California in *Mulkey, et al. v. Reitman, et al.* (printed at page 35 in the separate Appendix filed concurrently

[1]Petitioners are the defendants Neil Reitman, the owner of the apartment dwelling involved in the *Mulkey* case and his agents Mr. and Mrs. Herman Straesser, and Peggy Watson, and the defendant Clarence Snyder in the *Prendergast* case. The judgments below involved substantially the same federal constitutional issues and accordingly we submit a single petition.

herewith, and abbreviated herein as App.), is reported in (1966), 64 Cal. 2d —, 50 Cal. Rptr. 881. Two dissenting opinions [R. Mulk., III, IV; App. 57 and 78] are reported in 64 Cal. 2d —; 50 Cal. Rptr. at 892 and 901.

The memorandum opinion of the Superior Court of Los Angeles County in *Prendergast v. Snyder* is unreported (App. 79). The majority opinion of the Supreme Court of California (App. 87) is reported in (1966), 64 Cal. 2d —, 50 Cal. Rptr. 903. Two justices dissented [R. Prend., III; App. 90, 64 Cal. 2d —, 50 Cal. Rptr. at 905].

Jurisdiction.

The judgments below were entered on May 10, 1966 [R. Mulk., III; R. Prend., II]. A timely petition for rehearing was denied on June 8, 1966 [R. Mulk., VII; R. Prend., V]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) to review judgments declaring a state constitutional provision invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[2]

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 26 of Article I of the California Constitution, adopted as an initiative measure (Proposition 14) at the general election on November 3, 1964, by a popular vote of 4,526,460 to 2,395,747. The full text of that measure, together with the official ballot arguments, are submitted herewith (App.

[2]Referred to hereinafter, for brevity, as the equal protection clause.

1) as are the pertinent provisions establishing the initiative powers contained in Article IV, Section 1 of the California Constitution (App. 9).

The operative portion of Section 26 of Article I provides:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The balance of the measure defines "person" so as to exclude the State and its subdivisions, defines "real property" as residential property, excludes public accommodations, and sets forth a severability clause (App. 1-2).

Statutes involved are (i) California Civil Code, Sections 51 and 52 (App. 9) as amended in 1959, which will be referred to herein as by the Court below as the "Unruh Act" and (ii) California Health and Safety Code, Sections 35,700 *et seq.* adopted in 1963 (material portions printed at App. 11), which will be referred to herein as by the Court below as the "Rumford Act".

Questions Presented.

1. Does the adoption of a state constitutional amendment providing that the state shall not deny the right of an owner of private residential property to decline to sell or rent his property to such person as he chooses, sufficiently involve the state in the private conduct of an individual who refuses to lease his property on grounds of race so as to violate the equal protection clause?

2. Does the equal protection clause itself create an affirmative obligation upon a state to prohibit or provide a remedy against, or preclude a state from repealing statutory remedies against, racial discrimination in the sale or rental of privately-owned residential property.?

3. Does the equal protection clause itself require a state to deny judicial recognition of a landlord's right to possession of his property solely on the ground that he acquired or exercised such right because of the race of his tenant?

4. Does a state court deprive a landlord of his property without due process of law, or deny him the equal protection of the laws, by refusing, upon the basis of the equal protection clause itself, to recognize or enforce a right to possession available to all landlords, solely on the ground that he acquired or exercised his right to possession because of the race of his tenant?

5. Does the judiciary, state or federal, have the power to invalidate under the equal protection clause a popularly enacted initiative amendment to a state constitution which establishes a policy of nonregulation of private conduct which the state may, but is not required, to regulate?

Statement of the Cases.

Both judgments sought to be reviewed are based squarely on the proposition that Section 26 of Article I of the California Constitution violates the Fourteenth Amendment to the Federal Constitution[3] [R. Mulk., II-

[3]Thus the California Court said: "Our resolution of the question of constitutionality [of Section 26, Article I] is confined solely to federal constitutional considerations." (64 A.C. at p. 561, 50 Cal. Rptr. at p. 884, App. 38-39); and later: "We are

5; R. Prend., II-4]. The judgment in *Pendergast* was based on the additional ground that the Court was barred by the Fourteenth Amendment from giving any relief to a landlord who exercised his right to terminate an oral tenancy on the grounds his tenant was a Negro [R. Prend., I-33, II-4].

There is no factual dispute. In each case judgment was rendered for a Negro plaintiff in actions against a white landlord who had refused on grounds of the plaintiff's race to rent, or to continue to rent, privately-owned residential property.[4] The material proceedings in each case were:

1. Mulkey v. Reitman.

This was an action for damages and injunctive relief commenced in 1963 under the provisions of the Unruh Act against the owner of an apartment building for refusal to rent an apartment to plaintiffs solely because they were Negroes [R. Mulk., II-1-3]. Following the subsequent adoption of Section 26 of Article I of the California Constitution, the trial court dismissed the action on defendants' motion, solely upon the ground that the latter provision rendered the statutes "upon

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now confronted with those questions", *i.e.*, "'grave questions whether the . . . amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution.'" (64 A.C. at p. 563, 50 Cal. Rptr. at p. 885, App. 41). Further: "Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application." (64 A.C. at p. 573, 50 Cal. Rptr. at p. 892, App. 57).

[4]In a related decision, *Hill v. Miller*, 64 Cal. 2d —, 51 Cal. Rptr. 689, App. 91, the Court below rendered judgment for the landlord of a single family residence. As will appear, this decision is essential to an understanding of the precise basis of decision of the Court below in the cases here sought to be reviewed.

which this action is based null and void." [R. Mulk., II-3]. Plaintiffs unsuccessfully opposed the motion solely on the ground that Section 26, Article I, was unconstitutional under the state and federal Constitutions. The Supreme Court of California, with two justices dissenting, reversed, placing its decision entirely upon the ground that Section 26, Article I, contravened the equal protection clause (App. 35).

2. Prendergast v. Snyder.

This was an appeal by petitioner Snyder from an adverse judgment on his cross-complaint for declaratory relief against respondents Prendergast, husband and wife respectively a Negro and a Caucasian [R. Prend., II-1]. Mrs. Prendergast had rented an apartment from defendant in his seven unit dwelling on an oral month-to-month tenancy. Later Mr. Prendergast moved into the apartment, and in December, 1964 (following the adoption of Section 26, Article I) petitioner gave his tenants a 30-day written notice of termination of the tenancy [R. Prend.; II-1, 2]. There is no dispute that this notice complied fully with the nondiscriminatory laws of California relating to tenancies at will.

Prior to the expiration of the tenancy plaintiffs sought an injunction against their eviction, relying upon the Unruh Act and the Fourteenth Amendment. Plaintiffs urged the statute was in full force notwithstanding the adoption of Section 26, Article I; because that provision was invalid under the Fourteenth Amendment [R. Prend., II 34, 35].

By cross-complaint, petitioner sought a declaration that the tenancy had been terminated and that he was entitled to possession. [R. Prend., I-21]. Petitioner as-

serted his rights (1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, (2) to acquire, use, enjoy and dispose of his property in any manner he might choose which was not prohibited by statute, ordinance or other legislation, (3) to decline to rent to any particular person or persons or terminate such rental even if his unexpressed reason therefor was the race or religion of the person or persons involved, and (4) to have a court of law recognize and enforce the termination of plaintiffs' tenancy [R. Prend., I-20, 21, II-1, 2].

The trial court found it unnecessary to determine whether Section 26, Article I, was valid under the Fourteenth Amendment [R. Prend., I-34]. Nevertheless, it held that the Fourteenth Amendment barred a state court from granting petitioner any judicial relief, relying upon *Shelley v. Kraemer,* 334 U.S. 1. With two justices dissenting, the Supreme Court of California affirmed upon the ground that Section 26, Article I, violated the Fourteenth Amendment as well as upon the grounds relied upon by the trial court. [R. Prend., II-4, 64 A.C. at p. 593, 50 Cal. Rptr. at p. 905, App. 90].

In the related case of *Hill v. Miller* (App. 91) the Court below affirmed[5] the trial court's judgment for the landlord on demurrer in an action by a Negro tenant to restrain eviction. The Court gave two reasons for reaching a decision in *Hill* contrary to that in *Prendergast:* (1) The single-family residence involved in *Hill,* unlike the property involved in *Prendergast,*

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[5]64 Cal. 2d —, 51 Cal. Rptr 689, after granting a rehearing of its initial decision in which it had reversed the judgment of the trial court, 64 A.C. 598, 50 Cal. Rptr. 908.

had not been covered by the regulatory legislation of 1959 and 1963, and (2) the property owner in *Hill* sought no affirmative relief as had his counterpart in *Prendergast* (App. 94).

Reasons for Granting the Writ.

Taken together, these three decisions of a divided Court below constitute an unprecedented interpretation of the equal protection clause: Although a state is not required by that Clause to take affirmative action to prohibit racial discrimination in private housing, once such statutory prohibitions are adopted, the federal constitution forbids their modification or repeal [R. Mulk., II-19-20].

Moreover, the Court below holds that the Fourteenth Amendment prohibits a state court from recognizing or enforcing the personal, contract or property rights of a private citizen if his motives in acquiring or exercising those rights are those constitutionally forbidden to the state [R. Mulk., II-12-13; Prend., II-4; App. 90]. The stultification of personal liberty consequent upon such a doctrine is manifest: Once challenged in court, all conduct of private persons which the state could constitutionally regulate is to be measured by the stringent standards applied to governmental conduct. The result is to abandon the distinction between private and "state action"; to impose total regulation of private conduct by federal constitutional mandate even if the supreme legislature, the People, deliberately determine non-regulation to be in the public interest.

It is imperative that these holdings be reviewed by this Court for the following reasons:

1. The Decisions Below Constitute an Unprecedented Incursion Into the Legislative Prerogative in the Name of the Equal Protection Clause and Raise Questions of Nationwide Importance.

The decisions below fail to recognize that a legislative choice not to regulate certain conduct is as valid as a choice to regulate.[6] As a result, they pose questions of vital concern not only to the millions of Californians who exercised their democratic prerogative of voting in favor of the questioned state constitutional provision, but also to a whole nation troubled by the current tendency of many to contest their views in the streets rather than in the legislatures or at the ballot box:

Are the states or municipalities already having fair housing regulations forbidden by the Fourteenth Amendment from repealing or modifying them?

Must states considering discretionary civil rights legislation henceforth reckon with the prospect that such legislation, once enacted, is somehow constitutionally immune to modification or repeal in whole or in part?[7]

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[6]See *District of Columbia v. John R. Thompson Co. Inc.*, 346 U.S. 100, 114 where this Court said: "The repeal of laws is as much a legislative function as their enactment;" or to the main dissenting opinion (Mr. Justices Holmes, Brandeis, Pitney and Clark) in *Truax v. Corrigan*, 257 U.S. 312, 348, 349: ". . . just as the states have a broad discretion about establishing police regulations, so they have a discretion, equally broad, about modifying and relaxing them. * * *"

> "* * * And, just as one state might establish such protection by statute, so another state may, by statute, disestablish the protection, even as states have differed in their judicial determination of the general law upon the subject. * * *"

[7]Fifteen states have enacted legislative prohibitions against racial discrimination in certain types of private residential housing.

(This footnote is continued on the next page)

May not many legislators in the 41 states having no fair housing statutes refuse to vote for such already controversial legislation out of the fear that it can never be repealed or modified? Must our highly successful system of legislative trial and error in our several states be abandoned?

Must citizens throughout the nation abandon recourse to legislatures, courts and even the ballot box in seeking modification or repeal of unwanted regulation of wholly private areas of conduct?

Must property owners, business men, and financial institutions henceforth take into account in their dealings with members of minority groups that the generally available remedies to effect collection or repossession may be long delayed or wholly unavailable if the minority-group purchaser, lessee, borrower, or investor, though indebted or wrongfully holding property, alleges he is being sued because he is a Negro, Jew, Communist, Presbyterian, Republican or vocal proponent or opponent of the war in Viet Nam?

Does the Fourteenth Amendment to the federal Constitution grant more extensive rights to Negroes and impose more severe obligations on property owners in

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Three other states have such laws applicable only to publicly assisted housing (App. 15). The Congress is considering Federal legislation (H.R. 14765, 89th Congress, 1st Sess. §401 (1966) and the National Conference on Uniform State Laws is considering the adoption of a uniform act in this field. (L.A. Times, Aug. 5, 1966, §1, p. 11.) But thirty-one states have no such regulations. (App. 15). Interest in the decisions below is indicated by the fact that more than 92 civic, religious, labor, and civil rights organizations appeared as *amici curiae* before the Court below through no less than 74 lawyers. The constitutional issues raised here must be considered by every jurisdiction whether or not it has already enacted "fair housing" laws.

California than in other states? Can the temporary incumbents of a local legislature vary the substance of Fourteenth Amendment rights?

We submit that the decisions below, if allowed to stand, would compel an affirmative answer to each of these questions. The unintended effect would be to inhibit rather than advance the cause of civil rights as well as to disturb the basic distribution of political responsibility and power within the Nation.

Emanating from a widely-respected Court, these decisions are likely to be relied upon throughout the Nation. If so, they may be used to defeat proposed civil rights legislation or to bar any modification or repeal of such laws, however unpopular or ineffective those laws may be.[8]

For all of these practical reasons, we submit that answers from this Court to the important questions here raised are desperately needed by the entire Nation.[9]

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[8]The wisdom and necessity of legislative coercion in the field of discrimination by the owners of private residential property as applied in particular places and times is a question on which there "are rational arguments on either side and, quite clearly, there is room for difference of opinion here among reasonable men who share a common opposition to racial discrimination." Rice, *Bias in Housing: Toward A New Approach,* 6 Santa Clara Lawyer 162, 167-168 (Spring, 1966).

[9]An authoritative resolution of the questions raised by this petition is at least as imperative as the constitutional problem upon which six Justices of this Court expressed their views in *Bell v. Maryland,* 378 U.S. 226, 242, 286, 318. There the problem was whether the Fourteenth Amendment created a self-executing right of access by minority groups to a restaurant open to the public, over the racial objections of its private owner. Here one of the questions is whether there is such a constitutional right of access to privately owned residential property not devoted to public use.

2. The Decisions Below Establish a Concept of "State Action" Under the Fourteenth Amendment Which Is Wholly Unsupported by and in Substantial Conflict With Numerous Decisions of This Court.

The Court below held that California was responsible under the Fourteenth Amendment for the purely private racially discriminatory conduct of Mr. Reitman and Mr. Snyder. Such responsibility was fixed solely because in adopting Section 26 the people of California had "nullified" previously enacted legislation prohibiting such conduct and "forestalled" such legislation in the future except by further vote of the people.[10] (App. 40-41).

Solely by reason of this sequence of legislative activity, according to the Court below, the state "permits", "encourages", "authorizes", and is so "significantly involved in" private discriminatory conduct as to be responsible for it under the Fourteenth Amendment. The Court imported the quoted words from decisions of this Court rendered in cases involving conduct in the performance of inherently public or governmental functions, such as the conduct of primary elections, the exercise of municipal power by a town, or the operation of a municipal park in which there had been no change in "municipal maintenance and concern" and whose "predomi-

[10]The Court below does not suggest that the division of legislative power between the People and the representative legislature, ordained by the California Constitution (Article IV, § 1; App. 9) raises any federal constitutional question. Nor is it suggested there is any federal constitutional prohibition against the particular allocation of power made by Section 26 to the people rather than to the legislature. In *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 41 Cal. Rptr. 9, 13, a unanimous California Supreme Court rejected an argument that a reservation of legislative power by the people rendered a measure unconstitutional.

nant character and purpose" was municipal. To apply such decisions to the private conduct of private citizens in the disposition of their private residential property is to make utter nonsense of many decades of jurisprudence establishing the fundamental distinction between private and "state" action.

Demonstrably, the Court below did not find that Section 26 in fact encourages or authorizes racial discrimination. *Mulkey* could not have been decided on that ground because there the discriminatory conduct occurred long before Section 26 was proposed or adopted [R. Mulk., II-2, 3]. More significantly, had the Court found Section 26 to have actually encouraged or authorized discrimination it could not have decided *Hill v. Miller*, 64 Cal. 2d —, 51 Cal. Rptr. 689, as it did—permitting the landlord to prevail where he expressly relied on what he asserted was the "right" given him by Section 26 to refuse to rent to Negroes (App. 92). Section 26 "encourages" and "authorizes" racial discrimination only in the sense that California no longer prohibits or provides a remedy against such conduct in the narrow field of disposition of residential property by its private owner.[11] The Court held that change of policy,

[11]There is no statute, regulation, rule, municipal ordinance or policy of any governmental unit or officer in California which requires, permits, encourages or sanctions racial discrimination. On the contrary, there are numerous laws in California which encourage and in some instances require the complete elimination of racial discrimination. A summary of those laws is set forth in Appendix, p. 12. They are described in the dissenting opinion of Justice Thomas P. White below (App. 57). In addition, of course, the announcements, both official and unofficial, of our highest State constitutional officers, as well as prominent leaders in the Executive and Legislative Branches of our State Government and the statements of the Statewide chairmen of both the leading political parties, and the pronouncements

(This footnote is continued on the next page)

without more, subjected private discriminatory conduct to the proscriptions of the equal protection clause.[12]

That holding necessarily rests upon a wholly inaccurate equating of the facts of these cases with the subject matter of prior decisions of this Court:[13]

(a) The conduct of the private owners of residential property is equated with the conduct of institutions engaged in providing services to the public on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715, *Turner v. City of Memphis,* 369 U.S. 350, *Evans v. Newton,* 382 U.S. 296 [R. Mulk., II-15-22, App. 47-54].

(b) The private conduct of petitioners in choosing tenants of their own residential property is equated with the joint conduct of the arresting officer, prosecutor, court, jury, and jailer in Chickasaw, Alabama, the company-owned town author-

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of the California Supreme Court establish that every element of State Government in California strenuously opposes discrimination on the grounds of race, color, creed or national origin. No claim can honestly be made that there is a State-sponsored "mosaic" of discrimination in California. On the contrary, it has a comprehensive official policy against racial discrimination.

[12]As pereviously noted, *supra,* p. 5, in *Prendergast,* the Court also held, relying upon *Shelley v. Kraemer,* 334 U.S. 1, that judicial recognition of the rights here asserted by the property owners against Negro tenants would violate the Fourteenth Amendment even if Section 26 were itself valid. This proposition is discussed under point 3 hereof, *infra,* p. 17 *et seq.*

[13]The conflict of the decisions below with prior decisions of this Court is analyzed in "Editors' Case Note; State Encouraged Discrimination: *Mulkey v. Reitman* (Cal. 1966)," 6 Santa Clara Lawyer 241 (Spring, 1966).

ized by the state to exercise all the governmental powers of a public municipality. *Marsh v. Alabama,* 326 U.S. 501 [R. Mulk., II-15, App. 47].

(c) The private conduct of petitioners is equated with the conduct of the elaborate electoral institutions which in combination with state officials caused all Negroes to be systematically excluded from all participation in the only meaningful elections in certain southern states. *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461; *Nixon v. Condon,* 286 U.S. 73. See also *Anderson v. Martin,* 375 U.S. 399 [R. Mulk., II-14, 15, App. 47-48].

(d) Section 26, Article I of the California Constitution is equated with the statutes in *Robinson v. Florida,* 378 U.S. 153; *Evans v. Newton,* 382 U.S. 296, 15, L. Ed. 2d 373 (as construed in the concurring opinion of Mr. Justice White), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (as construed in the concurring opinion of Mr. Justice Stewart) [R. Mulk., II-16-22, App. 49-54]. The vices of those statutes, respectively, were the imposition of a greater burden upon one who chose not to discriminate in the operation of a restaurant,[14] the legalization of discrimination on grounds of race but on no other grounds in the establishment of public trusts,[15] and the classifica-

[14] *Robinson v. Florida,* 378 U.S. at p. 156. In that case this Court relied upon *Peterson v. Greenville,* 373 U.S. 244, where the city ordinance compelled racial discrimination by private restaurant owners.

[15] *Evans v. Newton,* concurring opinion of Mr. Justice White, 382 U.S. 296, 15 L. Ed. 2d at p. 384.

tion on racial grounds of the right of access to public accommodations.[16]

Section 26 applies to all property owners. It in no way burdens those who do not discriminate. It neither condemns nor authorizes any basis of decision by a property owner with respect to the choice of persons with whom he will deal. It certainly does not single out and favor racial as opposed to other forms of discrimination.

In *Burton,* eight of the justices treated the Delaware statute as reflecting the common law that a private restaurant operator could refuse service to anyone for any reason or for none. That is the plain effect of Section 26: It reestablishes the common law rule that was in effect until 1959 when California adopted the first of its statutes prohibiting racial and religious discrimination in housing.

Notwithstanding the adoption of Section 26, California continues to have more comprehensive legislative prohibitions of discrimination in housing than 41 other states (App. 15-24). The decisions below holding that the people of California are forbidden by the federal Constitution from maintaining or changing such a regulatory plan are plainly wrong.

Their grave portent to the integrity of the legislative process, their threat to the values of federalism, their restriction on the long-standing freedom of Americans to act in private relationships in any way they see fit so long as the action is not prohibited by law enacted

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[16] *Burton v. Wilmington Parking Authority*, concurring opinion of Mr. Justice Stewart, 365 U.S. at p. 726. See *Lewis*, "The Sit-in Cases: Great Expectations", The Supreme Court Review (1963), Univ. of Chi. Press, p. 145, n. 100 [R. Mulk., V-43, 44].

under some constitutional grant of power, and the institutional demands they would impose upon this Court, all urgently point to the necessity that such decisions should not be allowed to stand without review by this Court.

3. The Decisions Below Establish a Drastic, Almost Unique, and Wholly Erroneous Interpretation of *Shelley v. Kraemer*, 334 U.S. 1, Which Urgently Requires Clarification by This Court.

The California Court, relying on *Shelley*, held that a state court would violate the equal protection clause by merely entertaining or ruling on a defendant's plea for declaratory relief with respect to the validity of his private termination of a lease of his private property and of his right to possession of that property, if the termination had been based upon the racial prejudice of the defendant.[17]

The extreme interpretation of *Shelley* by the court below is unsupported by any decision of this Court and has been adopted by the courts of but one other state[18] in the eighteen years since *Shelley* was decided here. It is demonstrably in conflict with the Pennsylvania Supreme Court in the Second Girard Trust Case, in which this Court dismissed the appeal and denied certiorari.[19] It is also irreconcilable with the method

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[17]The superficiality of this analysis of "state action" is apparent from Mr. Justice Harlan's concurring opinion in *Peterson v. Greenville*, 373 U.S. 248 at p. 249. "* * * Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights Cases, supra (109 U.S. at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."

[18]*State v. Brown* (Del. 1963), 195 A. 2d 379; see also *Abstract Investment Co. v. Hutchinson* (1962), 204 Cal. App. 2d 242, 22 Cal. Rptr. 309.

[19]*In re Girard College Trusteeship* (Penna. 1957), 138 A. 2d 844, appeal dismissed and cert. den. 357 U.S. 570.

of analysis established by this Court in articulating its decisions in the numerous equal protection cases since *Shelley*. Many of these cases, including the sit-in cases of recent years, could have been handled summarily by citation of *Shelley* if it in fact held that judicial recognition of rights whose acquisition or assertion was motivated by racial prejudice would—without more—constitute unconstitutional state action. Instead, this Court has carefully focused on and defined the critical issue: Can the state fairly be charged with the responsibility for the discrimination in acquiring or asserting the right? If not, the discrimination is private. Surely subsequent judicial recognition of the validity of private rights cannot, standing alone, fairly be held to render the state responsible for the discriminatory act or motive out of which they arose. Such a far-reaching interpretation of *Shelley* has been rejected by all but a few of a host of learned commentators.[20]

The restrictive covenant cases are distinguishable from the cases here at issue in important respects. There, the Court was asked to compel discrimination by enjoining or burdening a transaction between willing

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[20]The principal articles are: Lewis, *The Meaning of State Action* (1960), 60 Col. L. Rev. 1083; Lewis, *The Sit-in Cases: Great Expectations*, The Supreme Court Review (1963), University of Chicago Press, particularly at pp. 114-119; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Van Alstyne and Karst, *State Action*, 14 Stanford L. Rev. 3 (1961) (especially *Case* 17 at p. 50); Kauper, *Civil Liberties and the Constitution*, Chapter IV, pp. 127 166, University of Michigan Press (1962); Pollak, *Racial Discrimination and Judicial Integrity; A Reply to Professor Weschsler*, 108 U. Pa. L. Rev. 1 (1959); St. Antoine, *Color Blindness but not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 Mich. L. Rev. 993 (1961) (especially pp. 1003-1016); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963).

parties, whereas in the cases below plaintiffs sought to force themselves on unwilling lessors. The Court below wholly ignored this vital distinction. Its holding in this respect directly contradicts the explanations of *Shelley* in the dissenting opinion of Mr. Justice Black for himself and Mr. Justice Harlan and Mr. Justice White in *Bell v. Maryland,* 378 U.S. 226 at p. 331 where it is said:

> *"This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses NOT to sell to a particular person or NOT to admit that person,* as this Court emphasized in Buchanan, he is entitled to rely on the guarantee of due process of law, that is 'law of the land', to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use." (Emphasis added.)

Judicial action in the restrictive covenant cases forcing willing sellers to discriminate against their will would have had the same characteristics as racial zoning ordinances, given the pervasiveness of such agreements, their duration, their intended applicability to successive non-consenting transferees, and the governmentally imposed sanctions for their breach. The restrictive covenants were held unenforceable for the same reason discriminatory zoning was invalidated, namely, they "an-

nulled the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." *Buchanan v. Warley,* 245 U.S. 60, 81. That rationale is plainly inapplicable to these cases where unwilling lessors are involved. Clearly, it has no bearing on the questioned provision of the California Constitution. That provision has none of the characteristics of a racial zoning ordinance, none of the features of a court-enforced system of restrictive covenants, and leaves strictly to the private decision of each property owner the choice of his buyer or tenant.

Moreover, as invoked below, *Shelley* would deprive petitioners of access to the courts to recover possession of their property from the wrongful occupation of plaintiffs and deny petitioners their due process and equal protection rights. For in California, an owner of real property with the right to possession can lawfully recover possession from one in actual though wrongful occupation only by an action in unlawful detainer.[21] If petitioners are denied the only remedy the law permits to recover their property, the result is to eliminate without their consent the only provision of the oral month-to-month tenancies they granted which distinguishes them from tenancies for a term. The result would be comparable to a reverse decree of specific performance in favor of the Negro tenants of a contract they did not have, the abrogation of a tenancy-at-will to which the parties had agreed, and the imposition upon landlords of the heavy burden of disproving a racial motive when dealing with Negro tenants.[22] Thereby petitioners

[21]California Code of Civil Procedure, Section 1161, *et seq.*

[22]See *e.g., Rice v. Sioux City Memorial Cemetery* (Iowa), 60 N.W. 2d 110, 115, aff'd 348 U.S. 880, vac. and cert. dis-

would be deprived of their property in a very real and tangible sense without any legislative justification and without due process of law, and would be denied the equal protection of the California unlawful detainer laws.[23]

If the California Supreme Court interpretation of *Shelley* is not reversed, an issue of constitutional proportions and psychiatric overtones may be presented by virtually every dispute between members of different racial, religious or political groups. The inevitable result will be the elimination of stability in a myriad of economic transactions, a shattering of a portion of the law of wills and property,[24] an inestimable increase in the costs of collection on defaulted obligations, a consequent reluctance to deal with members of minority groups, and an enormously expanded responsibility and burden on this Court quite out of keeping with the limited role of both this Court and the Federal Government under the Fourteenth Amendment. In short, the constitutional doctrine below would require this Court on a case by case basis to determine whether private conduct in an infinite variety of contexts should be

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missed, 349 U.S. 70; *Segre v. Ring* (N.H.), 170 A. 2d 265, 266 where the court said regarding an unequivocal restriction against assignment in a lease: "The Court will not rewrite the agreement to compel the [lessor] . . . to permit the assignment or to give their reasons for not doing so." See also, 32 Am. Jur., Landlord and Tenant, § 343.

[23]*Buchanan v. Warley*, 245 U.S. 60; *Bell v. Maryland*, 378 U.S. 226, 318 (dissenting opinion).

[24]Professor Herbert Wechsler in "The Nature of Judicial Reasoning," Part III, C, p. 295 of *Law and Philosophy*, N.Y. Univ. Press, 1964: "* * * But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the state would not be free to make on the initiative of officials. * * *"

subjected to the standards imposed upon the states by the Fourteenth Amendment.

As former Solicitor General Archibald Cox argued in the *amicus* brief filed on behalf of the United States in the 1964 sit-in cases:

> ". . . there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States —but only this Court—could exercise the final judgment."

Expressing a learned concern for the proper institutional role of the Supreme Court, the Solicitor General continued:

> "The preservation of a free and pluralistic society would seem to require substantial freedom for private choice, in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.
>
> "Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keep-

ing with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

* * *

"We read *Shelley v. Kraemer* as an instance of this moderate view. The more extreme argument may find support in some language in the opinion and has been espoused by a few commentators and two State courts,* but in our view the decision rests more solidly upon narrower grounds. The elements of law involved in the enforcement of restrictive covenants running with the land greatly outweigh any elements of private choice. The sting of restrictive covenants is the power to bind unwilling strangers to the initial transaction. * * *"[25]

**State v. Brown, supra; Abstract Investment Co. v. William O. Hutchinson,* 22 Cal. Rptr. 309 (D.C. App. 2d Dist., 1962).

For all of these reasons we urge this Court to declare that the Constitution does not oblige every court to close its doors to all litigants whose motives are tarnished by their dislike for the race, religion, or political views of their adversaries.

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[25]Supplemental Brief of the United States as *Amicus Curiae* in *Bell v. Maryland,* 378 U.S. 226, and related cases, p. 85, 87, 88-89. Substantially the same view of *Shelley* is set forth in the Government's *Amicus* brief (at pp. 17, 21, 26) in *Evans v. Newton,* 382 U.S. 296, 15 L. Ed. 2d 373.

4. The Decisions Below Conflict Fundamentally With the Broad Legislative Power Sustained by This Court in Such Decisions as *Ferguson v. Skrupa*, 372 U.S. 726, *A. F. of L. v. American Sash and Door*, 335 U.S. 538, and *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483.

Without discussion, the Court below ignored the settled principle that a legislature need not attack all evils in the same field simultaneously. It may elect to proceed one step at a time. It may select those phases of the problem it deems most amenable to regulation and leave other aspects of the same problem unregulated for a time or forever. The Court below itself recognized this principle in *Burks v. Poppy Construction Co.* (Cal. 1962), 20 Cal. Rptr. 609. There the Court sustained the power of the legislature to enact a 1959 statute[26] which prohibited racial discrimination in "publicly assisted" housing but left unregulated the conduct of owners of private housing in choosing their buyers or tenants.

Thus, the same California Court which expressly upheld the legislative power to exclude private housing in 1959 vetoed the exercise of that same power in 1964. This it did in the name of the equal protection clause and notwithstanding the fact that, after the adoption of Section 26, the law relating to private housing was still even more restrictive than it was as a result of the statute involved in *Burks*.

The judicial invalidation of state legislation by the Court below does violence to the principles of a sound federalism and of the proper distribution of govern-

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[26]This was the predecessor to the Rumford Act of 1963 (App. 9-10) which extended the prohibitions of the 1959 law to certain categories of privately owned housing accommodations.

mental power in our constitutional democracy. In this separate respect, the decisions below conflict fundamentally with the principles established by this Court in the cases cited above.

5. The Decisions Below Conflict With Decisions of the Highest Courts in Other States and With Certain Lower Federal Courts.

By invalidating Section 26, Article I of the California Constitution, the Court below has held that the failure of California to provide a remedy which it once provided against racial discrimination by the owners of private residential property violates the equal protection clause. The highest courts of other states and of certain lower federal courts have uniformly held that, to the contrary, the Fourteenth Amendment does not of its own force impose a duty upon the states to provide—or maintain—remedies against the following types of discriminatory private conduct:

1. Refusal of owner to sell or rent private residential property.[27]
2. Discrimination by real estate brokers.[28]

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[27] *Dorsey v. Stuyvesant Town Corporation* (N.Y. 1949), 87 N.E. 2d 541 [not unconstitutional though "Legislature deliberately refrained from imposing any restriction upon a redevelopment company in its choice of tenants."], cert. den. 339 U.S. 981; *Hackley v. Art Builders, Inc.* (D. Md. 1960), 179 F. Supp. 851; *Jones v. Mayer* (E.D. Mo. 1966), — F. Supp. —.

Accord: Traynor, "Law and Social Change in a Democratic Society" (1956) Univ. of Ill. Law Forum, pp. 220, 239 [". . . He has a right to choose his friends, to determine who may come upon his property or to whom he will sell it . . ."]

[28] *McKibbin v. Michigan Corporation & Securities Com'n.* (Mich. 1963), 119 N.W. 2d 557; *Jones v. Mayer* (E.D. Mo. 1966), — F. Supp. —.

3. Religious discrimination by owner of apartment complex housing 35,000 residents.[29]

4. Discriminatory refusal of service in places of public accommodation.[30]

5. Discrimination by employers.[31]

6. Discrimination by owner of cemetery.[32]

7. Discrimination by testators.[33]

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[29]*Watchtower Bible and Tract Society v. Metropolitan Life Ins. Co.* (N.Y. 11948), 79 N.E. 2d 433, cert. den., 335 U.S. 886.

Accord: *Hall v. Virginia* (1948), 335 U.S. 875, summarily dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369 [conviction of trespass affirmed as against contention that statute permitting owner of 60 unit apartment to exclude Minister of Jehovah's Witness' sect from distributing religious tracts in the entrance, elevators, hallways thereof was deprivation of rights of free speech, religious freedom, etc.]

[30]*State v. Brown* (Del. 1963), 195 A. 2d 379 [upholding statute permitting discrimination by innkeepers in derogation of common law]; *Williams v. Howard Johnson's Restaurant* (4th Cir. 1959), 268 F. 2d 845; *Williams v. Hot Shoppes, Inc.* (D.C. Cir. 1961), 293 F. 2d 835; *Williams v. Howard Johnson's Inc. of Washington* (4th Cir. 1963), 323 F. 2d 102, cert. den. 382 U.S. 814, 15 L. Ed. 2d 61, reh. den. 382 U.S. 933, 15 L. Ed. 2d 345 (1965).

In the latter case, the Court of Appeals said: "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of deprivation of the equal protection of the law would be totally to emasculate existing case law. * * *" (at p. 106).

[31]*Black v. Cutter Laboratories* (Cal. 1955); 278 P. 2d 905, cert. den. 351 U.S. 292; *Jones v. American President Lines* (1957), 149 Cal. App. 2d 319; *Cf. Railway Mail Ass'n v. Corsi* (1944), 326 U.S. 88, 98, concurring opinion: "Of course a State may leave abstention from such discriminations [by employers] to the conscience of individuals."

[32]*Rice v Sioux City Memorial Park Cemetery* (Ia. 1953), 60 N.W. 2d 110, aff'd, 348 U.S. 880, vac. and cert. dism., 349 U.S. 70.

[33]*In re Girard College Trusteeship* (Pa., 1958), 138 Atl. 2d 844; appeal dismissed and cert. denied (1958), 357 U.S. 570; *Gordon v. Gordon* (Mass. 1955), 124 N.E. 2d 228; *United States National Bank v. Snodgrass* (Or. 1954), 275 P. 2d 860; *Cf. Pennsylvania v. Board of Directors of City Trusts* (1957), 353 U.S. 230.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

NEIL REITMAN *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Appendix to Petition for a Writ of Certiorari to the Supreme Court of California.

STATUTES AND CONSTITUTIONAL PROVISIONS.

Article I, Section 26, California Constitution.

Text.

Sales and Rentals of Residential Real Property

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any sub-

division thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable. [*New section adopted November 3, 1964*]

Ballot Arguments.

SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. Initiative Constitutional Amendment. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels and similar public places.

Analysis by the Legislative Counsel

This measure would add Section 26 to Article I of the California Constitution. It would prohibit the State and its subdivisions and agencies from directly or indirectly denying, limiting, or abridging the right of any "person" to decline to sell, lease, or rent residential "real property" to such person or persons as he, in his absolute discretion, chooses.

By definitions contained in the measure, "persons" would include individuals, partnerships, corporations and other legal entities, and their agents or representatives, but would not include the State or any of its subdivisions with respect to the sale, lease, or rental of property owned by it. "Real property" would mean any residential realty, regardless of how obtained or financed and regardless of whether such realty consists

of a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

The measure would not apply to the obtaining of property by eminent domain, nor to the renting or providing of any transient lodging accommodations by a hotel, motel, or other similar public place engaged in furnishing lodging to transient guests.

Argument in Favor of Proposition No. 14

Your "Yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.

Most owners of such property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

The Rumford Act establishes a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

Your "Yes" vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another.

Under the Rumford Act, any person refused by a property owner may charge discrimination. The owner must defend himself, not because he refused, but for his

reason for refusing. He must defend himself for alleged unlawful thoughts.

A politically appointed commission (Fair Employment Practices Commission) becomes investigator, prosecutor, jury and judge. It may "obtain . . . and utilize the services of all governmental departments and agencies" against you. It allows hearsay and opinion evidence.

If you cannot prove yourself innocent, you can be forced to accept your accuser as buyer or tenant or pay him up to $500 "damages."

You may appeal to a court, but the judge only reviews the FEPC record. If you don't abide by the decision, you may be jailed for contempt. You are never allowed a jury trial.

If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?

Your "Yes" vote will prevent such tyranny. It will restore to the home or apartment owner, whatever his skin color, religion, origin, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private par-

ties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation.

Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.

Your "Yes" vote will end such interference. It will be a vote for freedom.

Submitted by:

L. H. WILSON
Fresno, California
Chairman, Committee
for Home Protection

JACK SCHRADE
State Senator
San Diego County

ROBERT L. SNELL
Oakland, California
President, California
Apartment Owners
Association

Argument Against Proposition No. 14

Leaders of every religious faith urge a "NO" vote on Proposition 14.

Leaders of both the Republican and Democratic parties urge a "NO" vote on Proposition 14.

Business, labor and civic leaders urge a "NO" vote on Proposition 14.

Why such overwhelming opposition? Because Proposition 14 would write hate and bigotry into the Constitution. It could take away your right to buy or rent the home of your chioce.

The evidence is clear:

1. *Proposition 14 is a deception.* It does not give you a chance to vote for or against California's Fair Housing Law. Instead, it would radically change our Constitution by destroying all existing fair housing laws. But more than that, it would forever forbid your elected officials of the state, cities and counties from any future action in this field. It would also threaten all other laws protecting the value of our properties.

2. *Proposition 14 says one thing but means another.* Its real purpose—to deny millions of Californians the right to buy a home—is deliberately hidden in its tricky language. Its wording is so sweeping it could result in persons of any group being denied the right to own property which they could afford.

3. *Proposition 14 is not legally sound.* California's Supreme Court already has said there are "grave" doubts as to its constitutionality. It destroys basic rights of individuals and thus is in violation of the U.S. Constitution.

4. *Proposition 14 is misleading.* California already has a fair and moderate housing law similar to those in effect in 10 other states. In five years the Fair Employment Practice Commission, which administers this law, has dealt with over 3,500 cases in both employment and housing. *All but four cases were either dismissed or settled in the calm give-and-take of conciliation.*

5. *Proposition 14 is a threat.* It would strike a damaging blow to California's economy through loss of $276,000,000 in federal redevelopment and other construction funds. Thousands of Californians could be thrown out of work.

6. *Proposition 14 is immoral.* It would legalize and incite bigotry. At a time when our nation is moving ahead on civil rights, it proposes to convert California into another Mississippi or Alabama and to create an atmosphere for violence and hate.

For generations Californians have fought *for* a tolerant society and *against* the extremist forces of the ultra-right who actively are behind Proposition 14.

Now a selfish, mistaken group would restrict free trade in real estate in California—a powerful lobby seeking special immunity from the law for its own private purposes is asking you to vote hatred and bigotry into our State Constitution.

Do not be deceived. Join the leaders of our churches, our political parties and business and labor in voting "NO" on Proposition 14. Before you vote study! Learn why you should join us!

REVEREND
DR. MYRON C. COLE
President, Council of Churches in Southern California

MOST REVEREND
HUGH A. DONOHOE
Bishop, Catholic Diocese of Stockton

STANLEY MOSK
Attorney General of California

Material Portions of Section 1, Article IV, California Constitution.

LEGISLATIVE DEPARTMENT

Legislative Power Vested in Senate and Assembly.

SECTION 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

California Civil Code Section 51, 52 (California Civil Rights Law, as Amended in 1959 — the Unruh Act).

California Civil Code §51

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All ~~citizens~~ *persons** within the jurisdiction of this ~~state~~ *State are free and equal, and no matter what their race, color, religion, ancestry or national origin* are entitled to the full and equal accommodations, advantages, facilities, ~~and~~ privileges, of ~~inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bathhouses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable to all citizens.~~ *or services in all business establishments of every kind whatsoever.*

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons* of every color, race, religion, ancestry or national origin.*

*1961 amendment, deleted "citizens".

California Civil Code §52

Whoever denies ~~to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code,~~ or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, ~~or~~ race, *religion, ancestry or national origin, contrary to the provisions of Section 51 of this Code,* ~~or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose,~~ *is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this Code.*

[California Civil Code §§ 51-52 as amended in 1959.]

California Health and Safety Code Section 35,700 et seq. (Material Portions of California "Fair Housing" Law of 1963 — the Rumford Act).

California Health & Safety Code §§ 35700-43—This Act makes it unlawful:

§35720(6) "For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, and to transactions relating to sales, rentals, leases, or acquisition of housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, national origin, or ancestry with reference thereto"; and

§35720(7) "For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, national origin or ancestry of such person or persons, or of prospective occupants or tenants, in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance"; and

§35720(8) "For any person to aid, abet, incite, compel or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so."

Other California Antidiscrimination Statutes.

1. Civil Code §69 and Health & Safety Code §10350—Applicants for a marriage license shall not be required to state for any purpose their race.

2. Civil Code §782—Any provision in deed of real property proporting to restrict right to sell, etc. to one race is void.

3. Education Code §8451—No teacher nor entertainments around a school shall reflect in any way upon citizens of the United States because of their race.

4. Education Code §8452—No textbooks, etc. which are adopted shall reflect upon citizens of the United States because of their race.

5. Education Code §13274—Reflects state's policy against persons charged with hiring teachers refusing or failing to do so for reasons of the race of the applicant.

6. Education Code §13732—No questions concerning race shall be asked of any applicant whose name has been certified for appointment for classified positions.

7. Election Code §223—No County Clerk can refuse to deputize any person to register voters because of that person's race.

8. Government Code §19702—No person shall be discriminated against for Civil Service appointment because of race, color, national origin, etc.

9. Government Code §19704—Unlawful to permit any notation to be made on an application or examination for Civil Service indicating the race of any person.

10. Government Code §54091—Any governmental entity which owns, operates or controls beaches shall allow use of them by all persons regardless of color.

11. Government Code §§50260-62—Authorizes counties over 2,000,000 population to establish a commission to develop plans for preserving peace among citizens of all races. Authorizes counties and cities to expend public funds to promote positive human relations.

12. Government Code §8400—Prohibits inclusion of any question relative to an applicant's race to be filled in and submitted by applicant to any board, commission, agents, etc., of this state.

13. Health & Safety Code §33039—State recognizes one of causes of slums is racial discrimination in seeking housing; public policy that this factor will be taken into consideration in any redevelopment program.

14. Health & Safety Code §33050—Policy of State that is undertaking community redevelopment there will be no discrimination because of race.

15. Health & Safety Code §33435—Agencies shall obligate lessees and purchasers of real property acquired in urban renewal to refrain from restricting rental, sales or lease on basis of race. All such deeds or leases shall be submitted to the agency and shall include non-discrimination clauses.

16. Health & Safety Code §33436—Contains the anti-discrimination clauses required to be in the leases, etc.

17. Insurance Code §§11628-29—Insurer cannot refuse to accept application or cancel insurance under conditions less favorable to insured except for reasons

applicable to all races, nor charge one race a higher premium.

18. Labor Code §1735—No discrimination made in employment of persons upon public works because of race; contractor violating this is subject to penalties.

19. Labor Code §1777.6—Unlawful for employer or labor union to refuse to accept otherwise qualified employees as indentured apprentices on any public work solely on basis of race.

20. Labor Code §§1410-32—Fair Employment Practice Act. §1411 states that it is the public policy of this state to protect the rights of all persons to seek employment without discrimination.

The Act applies to employers of five or more persons, labor organizations, employment agencies, and to the State or any of its political subdivisions and cities. The Act does not cover social, fraternal, charitable, educational, or religious associations, non-profit corporations, or employers of agricultural and domestic workers. The Act prohibits an employer to refuse to hire or to discharge from employment any persons because of race, or to discriminate in terms of compensation, etc. on such basis. An employer cannot use an application form or make inquiry of the prospective employee which directly or indirectly expresses a limitation based on race. The bill establishes the Fair Employment Practice Commission to administer the Act.

21. Welfare & Institutions Code §§2380-86—State will not approve local plans to promote community activities among old people unless it is available to all older citizens regardless of race.

Survey of State and Municipal Laws Regulating Racial Discrimination in Housing.

This survey of state and municipal laws relative to "fair housing" is essentially a compilation of information and data published by the Housing and Home Finance Agency of the Federal Government in September of 1964 under the title, *"Fair Housing Laws."* The information contained herein was brought up to date by reference to *Race Relations Law Reporter*. In order to create categories of State fair housing laws, the Housing and Home Finance Agency publication used the following definitions which are also used herein:

PUBLIC HOUSING:

"Housing provided in whole or in part by loans, grants, advances or contributions from a Federal, State, or local governmental body and owned and operated by a governmental instrumentality."

URBAN RENEWAL HOUSING:

"Housing on land purchased from a local public agency pursuant to a plan for the elimination and prevention of slums and blight."

OTHER PUBLICLY ASSISTED HOUSING (FHA, etc.):

"Housing (other than public housing or urban renewal housing) which is constructed or rehabilitated with Government assistance. This includes primarily housing the construction or rehabilitation of which is financed by loans insured or guaranteed by the Federal Housing Administration (FHA), Veterans Administration (VA), or other agency of the Federal, State, or local government. This category also includes housing assisted by means of tax exemption or abatement."

PRIVATE HOUSING:

"Housing provided without Government assistance (such as grants, loans, insurance, or guarantees) and owned by private persons or entities."

In some cases, the statutory language has been quoted herein in order to describe more precisely the coverage of some of the statutes.

STATE LAWS

SUMMARY
(Excluding California)

31 States have no statutes regulating discrimination in housing
18 States have some form of fair housing statute
3 States with such statutes limit their applicability to public, urban renewal or other publicly assisted housing
15 States apply their fair housing statutes in some measure to private housing
13 States which do so provide exemptions for one or more categories
2 States, Michigan and Alaska, do so without any exemptions.

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
Alabama	No	—	—
Alaska	Yes	Is a combined public accommodations and housing statute. All four categories of housing are included: ". . . including but not limited to public housing and all forms of publicly assisted housing, and any housing accommodation offered for sale, rent, or lease."	None
Arizona	No	—	—
Arkansas	No	—	—

California	—	—	—
Colorado	Yes	Applies to all four categories of housing: "'Housing' shall mean any building, structure, vacant land, or part thereof. . . ."	1. Room or rooms offered for sale or lease in a single family dwelling maintained or occupied in part by the owner or lessee as his household. 2. Housing operated by nonprofit fraternal, educational, or social organizations.
Connecticut	Yes	A combined public accommodation and housing statute. All four categories of housing are included. (". . . including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation or building lot, on which it is intended that a housing accommodation will be constructed, offered for sale or rent. . . .")	1. Rental of a unit in an owner-occupied two-family dwelling. 2. Rental of rooms in a house by occupant.
Delaware	No	—	—
Florida	No	—	—
Georgia	No	—	—
Hawaii	No	—	—
Idaho	No	—	—

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
Illinois	Yes	A public housing statute making it "a violation of civil rights" for an official to deny the full and equal enjoyment of the accommodations, privileges, facilities, etc. of his office because of race, religion, color or national ancestry. An urban renewal statute prohibits racial or religious restrictive covenants or provisions.	Not Applicable
Indiana	Yes	Applies to all four categories of housing: ". . . purchase or rental of real property including but not limited to housing." (Prior to 1965, the law covered only public and urban renewal housing.)	Owner-occupant of residential building containing less than four units.
Iowa	No	—	—
Kansas	No	—	—
Kentucky	No	—	—
Louisiana	No	—	—

Maine	Yes	Applies to rental housing in all four categories: ". . . any dwelling, structure or portion thereof offered for rent which is used or occupied or is intended, arranged or designed to be used or occupied as the home, residence or sleeping place of one or more persons. . . ."	1. Rental of one-family unit of an owner-occupied two-family dwelling. 2. Rental of not more than four rooms of a one-family owner-occupied dwelling.
Maryland	No	—	—
Massachusetts	Yes	All four categories of housing are included: "The term 'housing or housing accommodations' includes any building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." There is a separate statutory prohibition against discrimination in low rent housing projects.	1. Rental of a unit in an owner-occupied two-family dwelling. 2. Housing operated by religious organizations or by charitable or educational organizations controlled by religious groups.
Michigan	Yes	The Michigan equal accommodations law prohibits discrimination in public housing. The Michigan constitution has been interpreted by the Michigan Attorney General as prohibiting discrimination in all four categories of housing (Mich. Atty.Gen. Op. No. 4161, July 22, 1963.)	None

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
Minnesota	Yes	All four categories of housing are covered by statutes. That portion of the statute relative to private housing refers to "any real property."	1. Rental of a unit in a two-family owner-occupied dwelling. 2. Rental of a room or rooms in an owner-occupied one-family dwelling. 3. Sale or rental of an owner-occupied one-family private dwelling.
Mississippi	No	—	—
Missouri	No	—	—
Montana	Yes	Relates only to urban renewal housing, but no stated penalty for violation and no agency charged with the administration of the prohibition. No legislation relative to public, other publicly assisted or, private housing.	Not Applicable
Nebraska	No	—	—
Nevada	No	—	—
New Hampshire	Yes	The statute in its terms relates to all four categories, but there is no provision covering the sale of housing, and no agency charged with adminis-	1. Rental of a one-family dwelling. 2. All sales of real property.

		tering the law. Violation is punishable by a fine or not less than $10 nor more than $100: ". . . places of public accommodation or in the matter of rental or occupancy of a dwelling in a building containing more than one dwelling."	
New Jersey	Yes	All four categories of housing are included: "All persons shall have the opportunity to obtain employment, to obtain all accommodations, advantages, facilities, and privileges of any place of public accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry or age. . . ."	1. Sale or rental of an owner-occupied one-two-, or three-family dwelling or any portion thereof. 2. Sale or rental of a one- or two-family dwelling or any portion thereof unless it is part of a group of 10 or more houses on contiguous land owned by the same person. 3. Rental of rooms in a one-family dwelling by occupant. 4. Housing operated by religious organizations, or by charitable or educational organizations controlled by religious groups.
New Mexico	No	—	—
New York	Yes	The New York Civil Rights Law has provisions prohibiting discrimination in public housing, urban renewal housing, and other publicly as-	1. Rental of a unit in an owner-occupied two-family dwelling.

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
		sisted housing. In addition, New York's comprehensive "Law Against Discrimination" prohibits discrimination in all housing: ". . . any building, structure, or portion thereof which is used or occupied . . . as the home, residence or sleeping place of one or more human beings."	2. Rental of rooms in a dwelling by the occupant. 3. Housing operated by religious organizations or by charitable or educational organizations controlled by religious groups.
North Carolina	No	—	—
North Dakota	No	—	—
Ohio	Yes	Applies to all four categories of "commercial housing." "'Commercial housing' means housing accommodations held or offered for sale or rent by a real estate broker, salesman or agent, or by any other person persuant to authorization by the owner, by the owner himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employees."	1. Personal residence (see statutory language quoted in coverage column) is defined as an owner-occupied one- or two-family dwelling. 2. Housing operated by a religious or denominational organization.

Oklahoma	No	—	—
Oregon	Yes	Although no particular type of housing is specified, the statute seems to apply to all four categories of housing. The statute prohibits discrimination by persons engaged in the business of selling, leasing, or renting real property.	1. Applies only to persons engaged in the business of selling real property.
Pennsylvania	Yes	Applies to all four categories of housing. The provisions relative to private housing are contained in a comprehensive act designated as the "Pennsylvania Human Relations Act." Public housing, urban renewal housing, and other publicly assisted housing is treated separately in less comprehensive form.	1. Sale or rental of an owner-occupied dwelling or rental of one unit in that dwelling. 2. Housing operated by (a) religious organizations (b) private or fraternal organizations, and (c) charitable or educational organizations controlled by religious groups.
Rhode Island	Yes	Applies to all four categories of housing: "The term 'housing accommodation' includes any building or structure, or portion thereof, or any parcel of land, developed or undeveloped, which is occupied, or is intended to be occupied, or to be developed for occupancy, for residential purposes. . . ."	1. Rental of room or rooms in an owner-occupied dwelling unit. 2. Rental of dwelling unit within an owner-occupied two or three family structure.
South Carolina	No	—	—

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
South Dakota	No	—	—
Tennessee	No	—	—
Texas	No	—	—
Utah	No	—	—
Vermont	No	—	—
Virginia	No	—	—
Washington	No	Washington had a statute relating only to publicly assisted and urban renewal housing which was held unconstitutional by the Washington Supreme Court.	—
West Virginia	No	—	—
Wisconsin	Yes	Applies only to public housing, public housing for veterans and the elderly, and urban renewal housing. Nothing for other publicly assisted or private housing.	Not Applicable
Wyoming	No	—	—

In summary, thirty-one states have no statutes regulating discrimination in housing while eighteen have adopted such statutes (California is not included in this computation). Of the eighteen statutes, three are limited in their application to some form of public, urban renewal, or other publicly assisted housing; the other fifteen apply in some measure to private housing. Of the fifteen remaining statutes which regulate discrimination in private housing, only two, Michigan's and Alaska's have no exemptions; the other thirteen have one or more exemptions.

MUNICIPAL LAWS AND ORDINANCES

The municipal ordinances and laws listed below (including laws of Washington, D.C., the Virgin Islands, and Puerto Rico) include only those which relate to private housing. As in the above compilation of state laws, the following were taken from *Fair Housing Laws*. According to this publication, as of the date of publication, over forty municipalities had enacted ordinances or resolutions declaring a public policy opposed to discrimination in public or urban renewal housing.

A few ordinances enacted since the publication of *Fair Housing Laws* have been included herein, but no representation is made that the additions made include all municipal changes subsequent to that date.

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Alabama	No	—	—
Alaska	No	—	—
Arizona	No	—	—
Arkansas	No	—	—
California	No	—	—
Colorado	No	—	—
Connecticut			
New Haven	Yes	Dovetails with State Statutes; coverage and exemptions are identical. Establishes a Commission on Equal Opportunities.	
New London	Yes	Dovetails with State Statute; Investigates and reviews complaints of violations of state statute.	
Delaware	No	—	—
Florida	No	—	—
Georgia	No	—	—
Hawaii	No	—	—

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Idaho	No	—	—
Illinois			
Chicago	Yes	Applies to all four categories of housing: ". . . any housing accommodation."	None—But ordinance applies only to real estate brokers (revocation of license is chief sanction).
E. St. Louis	Yes	Similar to Chicago ordinance except that penalty is $200.00 fine.	
Peoria	Yes	Applies to all four categories of housing: "The term 'housing accommodation' includes any building, structure or portion thereof which is used or occupied, or is maintained, arranged, or designed to be used or occupied, as a home, residence or sleeping place of one or more human beings."	Applies only to real estate brokers. The ordinance specifically provides that owners are not prohibited from imposing restrictions when his property is listed for sale with a broker: "Nothing in this ordinance shall be construed to restrict a property owner from selling or disposing of his property to whomsoever he pleases, or from listing his property with a broker for sale or lease with such restrictions as the owner may choose to impose."
Indiana			
Gary	Yes	Applies to all four categories of housing: "The term 'housing accommodations' means:	1. Any owner-occupied multiple family building designed to accommodate not more than

		(1) Any parcel or parcels of real property . . . available for the building of one or more housing units . . . (2) Any dwelling . . . used or occupied, or intended, arranged or designed to be used or occupied as the home, homesite, residence or sleeping place of one or more human beings. . . ."	three families. 2. Room or rooms within a single apartment. 3. Room or rooms within a single family private dwelling.
Indianapolis	Yes	Recently enacted comprehensive municipal fair housing legislation — details not contained herein.	
Iowa			
Des Moines	Yes	Recently enacted comprehensive municipal fair housing legislation — details not contained herein.	
Iowa City	Yes	Recently enacted comprehensive municipal fair housing legislation — details not contained herein.	
Kansas			
Wichita	Yes	Applies to all four categories of housing: "The term 'housing accommodation' includes any improved or unimproved real property, or portion thereof, which is used or occupied or is intended, arranged or designed to be used as the home, residence or sleeping place of one or more human beings. . . ."	1. Rental of a two-family dwelling. 2. Rental of fewer than four rooms in a one-family, owner-occupied dwelling. 3. Rental of any apartment in a multiple dwelling containing six or fewer apartments.
Kentucky	No	—	—

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Louisiana	No	—	—
Maine	No	—	—
Maryland	No	—	—
Massachusetts	No	—	—
Michigan			
Ann Arbor	Yes	Applies to all four categories of multiple housing accommodations. Applies to real estate brokers and financial institutions; prohibits discrimination in buildings containing five or more dwelling units, and in buildings or lots comprising a part of five or more dwellings or lots owned by or subject to the control of one person.	1. Does not apply to rental of rooms in a house by owner or lessee-occupant; 2. To an owner or lessee-occupied rooming house; 3. or to an apartment or house retained as the owner's home but leased during his absence.
Grand Rapids	Yes	Prohibits discrimination for all categories of housing in buildings containing three or more dwelling units; prohibits discrimination by one who owns, or controls the sale or lease of, three or more dwellings; prohibits discrimination by financial institutions.	1. The rental, by an owner-occupant residing in a three or more unit building of five or less units within the building; 2. The owner of less than three single family dwellings; 3. Religious or denominational organizations.

Minnesota Duluth	Yes	All urban renewal; other publicly assisted housing; and private housing except as noted.	1. Does not apply to the sale or lease of owner-occupied one-family dwelling; 2. Does not apply to rental of a portion of a two-family owner-occupied dwelling; 3. Does not apply to rental of rooms in an owner-occupied one-family dwelling.
St. Paul	Yes	Recently enacted comprehensive fair housing legislation—details not contained herein.	
Mississippi	No	—	—
Missouri St. Louis	Yes	". . . all housing accommodations." Ordinance applies to "any person" including real estate brokers.	Except the rental of rooms in a single-family residence.
Montana	No	—	—
Nevada	No	—	—
New Hampshire	No	—	—
New Jersey	No	—	—
New Mexico Albuquerque	Yes	All housing	1. Sub-renting or sub-leasing of any portion of apartment or house occupied by a single-family. 2. Housing owned or operated by religious institutions.

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
New York			
New York City	Yes	All housing, except	1. Rental of an apartment in a two-family owner-occupied private dwelling. 2. Rental of rooms within a single family private dwelling. 3. Rental of rooms within an apartment by the tenant-occupant of such apartment. 4. Housing owned or operated by religious or denominational organizations.
Schenectady	Yes	". . . all housing accommodations."	1. Those housing accommodations occupied by the owner and designed to accommodate three families or less. 2. Housing operated by religious institutions.
North Carolina	No	—	—
North Dakota	No	—	—
Ohio			
Oberlin	Yes	Applies to all buildings containing five or more dwelling units, and in buildings or lots if they comprise or are available for the building of five or more dwelling units and are owned by, or subject to the control of one owner.	

Toledo	Yes	All sales of real property and in rentals of a unit in buildings containing five or more units.	
Yellow Springs	Yes	Prohibits discrimination in employment, public accommodations, and all housing, except as noted.	1. The rental of an apartment in a two-family private dwelling by the owner-occupant thereof; 2. The rental of a room or rooms in an owner-occupied single-family private dwelling; 3. The rental of a room or rooms in an apartment by occupant thereof; 4. Housing owned or operated by religious or denominational organizations.
Oklahoma	No	—	—
Oregon	No	—	—
Pennsylvania			
Erie	Yes	Prohibits discrimination in employment, public accommodations, and all housing except as noted.	1. The sale or rental of a one- or two-family owner-occupied dwelling by the owner or his broker; 2. Housing owned or operated by religious or bona fide private or fraternal organizations.
Philadelphia	Yes	Prohibits discrimination in employment, public accommodations, and all housing except as noted.	1. The sale or rental of a one- or two-family owner-occupied dwelling by the owner or his broker;

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
			2. Housing owned or operated by religious or bona fide private or fraternal organizations.
Pittsburgh	Yes	Prohibits discrimination in buildings containing five or more dwelling units, and in buildings or lots if they comprise, or are available for the building of five or more dwelling units and are owned by, or are subject to the control of one owner.	Housing owned or operated by religious and denominational organizations is exempt.
Rhode Island	No	—	—
South Carolina	No	—	—
South Dakota	No	—	—
Tennessee	No	—	—
Texas	No	—	—
Utah	No	—	—
Vermont	No	—	—
Virginia	No	—	—
Washington King County	Yes	Recently enacted comprehensive fair housing legislation; details not set forth herein.	
West Virginia	No	—	—

Wisconsin Beloit	Yes	All four categories of housing are included ● ●	Except for the rental of an apartment house, or portion thereof containing accommodations for not more than three families. This exception does not apply if the apartment house is part of a group of 10 or more houses or dwelling units offered for sale or rental by one person.
Madison	Yes	Prohibits discrimination in employment, public accommodations, and all housing except as noted.	1. The rental of not more than four rooms in an owner-occupied building; and 2. the sale of, or rental of housing in, a building containing four or fewer dwelling units by the owner-occupant thereof.
Wyoming	No	—	—
District of Columbia	Yes	Includes all four categories of housing.	1. Rental of an owner-occupied one- or two-family dwelling. 2. Rental of not more than four rooms in an owner-occupied dwelling. 3. Rental as a unit or room by a religious or fraternal organization.

Municipality; By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Puerto Rico	Yes	Applies to all four categories of housing. ("The term 'dwelling' shall mean any building or part thereof used as a residence or for housing human beings.")	None
Virgin Islands	Yes	Applies to all four categories of housing (". . . to purchase or rent any item of real estate. . . .")	None

OPINIONS AND JUDGMENTS BELOW.

Majority Opinion of the California Supreme Court.

[L.A. No. 28360. In Bank. May 10, 1966.]

Lincoln W. Mulkey et al., Plaintiffs and Appellants, v. Neil Reitman et al., Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Orange County, Raymond Thompson, Judge. Reversed.

Action for general and statutory damages for refusing to rent an apartment to plaintiffs on the ground of race in violation of the Unruh Civil Rights Act. Summary judgment (treated as a judgment on the pleadings) for defendants reversed.

David R. Caldwell, A. L. Wirin, Fred Okrand, Joseph A. Ball and Herman F. Selvin for Plaintiffs and Appellants.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Brundage & Hackler, Charles K. Hackler, Julius Reich, Richard A. Bancroft, Jack Greenberg, Robert M. O'Neil, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr., Howard Nemerovski, John G. Clancy, Ephraim Margolin, Joseph B. Robison and Sol Rabkin as Amici Curiae on behalf of Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., Charles S. Battles, Jr., and Richard V. Jackson for Defendants and Respondents.

PEEK, J.—Plaintiffs appeal from a summary judgment entered upon the granting of a motion therefor in

an action for relief under sections 51 and 52 of the Civil Code.[1]

In the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations. The motion for judgment, therefore, properly should be designated as one for judgment on the pleadings and will be so treated on appeal. In any event the allegations of the complaint stand as admitted for our purposes. (See *Davis v. City of Santa Ana,* 108 Cal.App.2d 669, 685 [239 P.2d 656].)

Plaintiffs' complaint sets forth that they are husband and wife, citizens of the United States and residents of the County of Orange, that they are Negroes; that defendants are the owners and managers of a certain apartment building in Orange County; that in May 1963 at least one apartment therein was unoccupied and was being offered by defendants for rent to the general public; that plaintiffs offered to rent any one of available apartments and were willing and able to do so; that defendants refused to rent any of the available apart-

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[1]Civil Code, section 51, provides as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code, section 52, provides as follows:

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

ments to plaintiffs solely on the ground that plaintiffs were Negroes; that because of such refusal plaintiffs were unable to rent a suitable place to live; that they suffered humiliation and disappointment and endured mental pain and suffering; that defendants will continue to refuse to rent to plaintiffs and other members of their race solely on the ground of such race unless restrained by order of the court; that plaintiffs have no adequate remedy at law because the discrimination practiced by defendants is also practiced by other real estate brokers, and home and apartment landlords and owners in Orange County.

The motion for judgment was made and granted solely on the ground, as stated by the trial court, "that the passage of Proposition 14 had rendered Civil Code Sections 51 and 52 upon which this action is based null and void." The reference is to the initiative measure which appeared as Proposition 14 upon the statewide ballot in the general election of 1964. Following its approval by the voters it was incorporated into the California Constitution as article I, section 26.

Plaintiffs unsuccessfully opposed the motion on the ground that article I, section 26, is void for constitutional reasons under both the state and federal Constitutions. This contention presents the sole question on appeal.

Proposition 14, as now incorporated into the California Constitution, provides in full as follows:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such

person or persons as he, in his absolute discretion, chooses. .

" 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

" 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable." (Cal. Const., art. I, §26.)

For reasons which hereafter appear we do not find it necessary to discuss claims of the unconstitutionality of article I, section 26, based on California constitutional provisions and law. Our resolution of the question of constitutionality is confined solely to federal constitu-

tional considerations. [1] We note preliminarily that although we are examining a provision which, by its enactment by ballot, has been accorded state constitutional stature, the supremacy clause of the United States Constitution nevertheless compels that section 26, like any other state law, conform to federal constitutional standards before it may be enforced against persons who are entitled to protection under that Constitution. (See *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737 [84 S.Ct. 1472, 12 L.Ed. 632].)

[2] A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (*In re Petraeus* (1939) 12 Cal.2d 579, 583 [86 P.2d 343]; see *Griffin v. County School Board,* 377 U.S. 218, 231 [84 S.Ct. 1226, 12 L.Ed.2d 256]), and for its ultimate effect (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880 [31 Cal. Rptr. 606, 382 P.2d 878]); *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 341-343 [81 S.Ct. 125, 5 L.Ed. 2d 110]; *Avery v. Georgia* (1953) 345 U.S. 559, 562 [73 S.Ct. 891, 97 L.Ed. 1244]; *Near v. Minnesota* (1931) 283 U.S. 697, 708-709 [51 S.Ct. 625, 75 L.Ed. 1357]). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [335 P.2d 672]; *Evans v. Selma Union High School Dist.* (1924) 193 Cal. 54, 57-58 [222 P. 801, 31 A.L.R. 1121]; see *Snowden v. Hughes* (1944) 321 U.S. 1, 8-9 [64 S.Ct. 397, 88 L. Ed. 497].)

In 1959, the State Legislature took the first major steps toward eliminating racial discrimination in hous-

ing. The Unruh Civil Rights Act (Civ. Code, §§ 51, 52) prohibited discrimination on grounds of "race, color, religion, ancestry, or natural origin" by "business establishments of every kind." On its face, this measure encompassed the activities of real estate brokers and all businesses selling or leasing residential housing. (See *Lee v. O'Hara* (1962) 57 Cal.2d 476 [20 Cal.Rptr. 617, 370 P.2d 231]; *Burks v. Poppy Constr. Co.* (1962) 57 Cal.2d 463 [20 Cal.Rptr. 609, 370 P.2d 313].)

At the same session the Legislature passed the Hawkins Act (formerly Health & Saf. Code, §§ 35700-35741) that prohibited racial discrimination in publicly assisted housing accommodations. In 1961 the Legislature broadened its attempt to discourage segregated housing by enacting proscriptions against discriminatory restrictive covenants affecting real property interests (Civ. Code, § 53) and racially restrictive conditions in deeds of real property (Civ. Code, § 782).

Finally in 1963 the State Legislature superseded the Hawkins Act by passing the Rumford Fair Housing Act. (Health & Saf. Code, §§ 35700-35744.) The Rumford Act provided that "The practice of discrimination because of race, color, religion, natural origin, or ancestry is declared to be against public policy" and prohibited such discrimination in the sale or rental of any private dwelling containing more than four units. The State Fair Employment Practice Commission was empowered to prevent violations.

[3] Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right. In short, Propo-

sition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market.

Prior to its enactment the unconstitutionality of Proposition 14 was urged to this court in Lewis v. Jordan, Sac. 7549 (June 3, 1964). In rejecting the petition for mandamus to keep that proposition off the ballot we stated in our minute order "that it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls. . . ." But we further noted in order that "there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United State Constitution. . . ." We are now confronted with those questions.

Plaintiffs' basic contention is that the foregoing provision cannot constitutionally withstand the mandate contained in section 1 of the Fourteenth Amendment to the United States Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Thus, the constitutional proscription invoked is twofold. First, it is a limitation on state, as distinguished from private action and, second, it directs that such state action, where undertaken, meet certain minimum standards. If we assume for the moment that the state has undertaken to act in these circumstances, then the pertinent issue becomes whether such action accords equal protection of the laws to plaintiffs. We consider such issue initially.

[4] ~~It is now beyond dispute that the Fourteenth Amendment, through the equal protection clause, secures, "without discrimination on account of color, race~~

[or] religion, 'the right to acquire and possess property of every kind' . . ." (*Buchanan v. Warley* (1917) 245 U.S. 60, 62 [38 S.Ct. 16, 62 L.Ed. 149]; (italics added.) In *Shelley v. Kraemer* 334 U.S. 1, the court expressed itself as follows at page 10 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441]: ". . . among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." (See also *Brown v. Board of Education* (1954) 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180]; *Barrows v. Jackson* (1953) 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586]; *Jackson v. Pasadena City School Dist.* (1963) *supra,* 59 Cal. 2d 876; *Sei Fujii v. State of California* (1952) 38 Cal.2d 718 [242 P.2d 617].)

[4] It is now beyond dispute that ". . . among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." (*Shelley v. Kraemer,* 334 U.S. 1, 10 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441]; see also *Buchanan v. Warley* (1917) 245 U.S. 60 [38 S.Ct. 16, 62 L.Ed. 149]; *Brown v. Board of Education* (1954) 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873,

38 A.L.R.2d 1180]; *Barrows v. Jackson* (1953) 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586]; *Jackson v. Pasadena City School Dist.* (1963) *supra,* 59 Cal.2d 876; *Sei Fujii v. State of California* (1952) 38 Cal. 2d 718 [242 P.2d 617].)*

[5] The question of the fact of discrimination, by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved. Thus, as a complete and only answer to plaintiffs' allegations which irrefutably establish a discriminatory act, defendants urge that section 26 accords them the right as private citizens to so discriminate. [6a] The only real question thus remaining is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment. For the reasons stated below we have concluded that state action is sufficiently involved to fall within the reach of the constitutional prohibition.

The parties generally concede that in an organized and regulated society the state or its subdivision play some part in most, if not all, so-called private transactions, and it must be acknowledged, without specifically

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*Original language of point [4] was stricken and new language substituted by modification of opinion on denial of rehearing, June 8, 1966.

enumerating them, that many of the rights and duties arising out of the transfer of an interest in real property are related to or dependent upon the state or local governments. But it is not the mere fact that in some manner the state is involved, however remotely, with which we are concerned. [7] It is only where the state is significantly involved that the prohibitions of the equal protection clause are invoked. The Supreme Court in *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, stated the proposition in the following language at page 722 [81 S.Ct. 856, 6 L.Ed. 2d 45]: ". . . private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have been involved in it." That proscribed state involvement is not to be limited to direct conduct on the part of its employees, agents and representatives is made apparent by the court's further statement at page 722: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." More recently the Supreme Court has stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." (*Evans v. Newton* (1966) 382 U.S. ..... [86 S.Ct. ....., 15 L.Ed.2d 373].)

[6b] However subtle may be the state conduct which is deemed "significant," it must nevertheless constitute action rather than inaction. The equal protection clause and, in fact, the whole of the Fourteenth Amendment, is prohibitory in nature and we are not prepared to

hold, as has been urged, that it has been or should be construed to impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. Urged in support of such proposition is *James v. Marinship Corporation,* 25 Cal. 2d 721 [155 P.2d 329, 160 A.L.R. 900]. But the prior state commitment in that case is clear. We held that a so-called private labor union could not racially discriminate against those who wished to become members, but we first concluded that the union, because it had obtained a monopoly on the labor supply, was like a public service business which, under the law of the state, was precluded from discriminating on the basis of race. Likewise, in *Jackson v. Pasadena City School Dist., supra,* 59 Cal.2d 876, the state, because it had undertaken through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools.

The problem thus becomes one of ascertaining positive state action of a degree sufficient to be deemed significant in the accomplishment of the recognized and admitted discrimination.

To conclude that there is state action in the instant circumstances we are not limited to action by one who, cloaked with the authority of the state, acts as its designated representative. In the broad sense, state action has been consistently found where the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purpose. Thus, state conduct has been found in the action of a trial court in enforcing a privately created restrictive covenant which prevented a

sale of real property to a Negro buyer. (*Shelley v. Kraemer, supra,* 334 U.S. 1.) In that case the court stated at page 14: ". . . [T]he Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.' " In applying the *Shelley* reasoning that the processes of the court cannot be utilized to accomplish a private discrimination, it has been held reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the defendant tenant was admittedly in default. (*Abstract Investment Co. v. Hutchinson,* 204 Cal.App. 2d 242 [22 Cal.Rptr. 309].)

Shelley, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the *Shelley* and the *Abstract* cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate. The court is not asked to enforce a covenant nor to eject a tenant, but only to render judgment denying the relief sought in accordance with the law of the state. Thus, it is contended by defendants that the isolated act of rendering such a judgment does not significantly involve the state in the prior act of discrimination.

It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests. (See *Burton v. Wilmington Parking Authority, supra,* 365 U.S. 715, 722.) Thus, in *Marsh v. Alabama,* 326 U.S. 501 [66 S.Ct. 276, 90 L.Ed. 265], an entire town was owned by a purely private company, the agents of which caused the arrest for trespass of persons engaged in exercising their constitutional freedom of speech. Although no governmental officials or agents were involved, the Supreme Court found sufficient state action to invoke the Fourteenth Amendment. This was based on the view that the company managers were performing a governmental function of managing and controlling a town wherein persons resided who were entitled to Fourteenth Amendment protections: ". . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took plate, where held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . ." (*Marsh v. Alabama, supra,* at p. 509.) There, as contended by defendants in the instant case, the state did not participate except to condone private action.

Even more applicable in the instant circumstances are the so-called "white primary cases." (*Smith v. Allwright,* 321 U.S. 649 [64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110]; *Terry v. Adams,* 345 U.S. 461 [73 S.Ct.

809, 97 L.Ed. 1152]; *Nixon v. Condon,* 286 U.S. 73 [52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458]; *Baskin v. Brown,* 174 F.2d 391; *Rice v. Elmore,* 165 F.2d 387.) In those cases private action infringing the right to vote was held to be the equivalent of state action where accomplished with the culpable permission of the state. In *Nixon v. Condon, supra,* 286 U.S. 73, for instance, a state statute which forbade voting by Negroes in primaries was declared to be unconstitutional. It was thereupon repealed and a substitute measure enacted which was wholly permissive, that is, political parties were allowed to prescribe the qualifications for membership and voting rights in the party's primaries. A local political party thereafter barred Negroes from voting in its primaries and it was held that the permissive private action was chargeable as state action. (See also *Baskin v. Brown, supra,* 174 F.2d 391, 394.)

A similar abdication of a traditional governmental function for the obvious purpose of condoning its performance under color of private action has recently been struck down by the Supreme Court in *Evans v. Newton, supra,* 382 U.S. ..... There, a park for the enjoyment of white persons was owned, managed and maintained by the City of Macon, Georgia, as trustee under the 1911 will of Senator August Bacon. When a question was raised whether the city could continue to maintain the segregated park consistent with the Equal Protection Clause, it purported to transfer the park to private trustees with the intent that it would continue to be maintained for the enjoyment of white persons only. The foregoing conduct on the part of the municipality was held to be proscribed by the Fourteenth Amendment.

It is contended by defendants, however, that the foregoing cases, in the main, involved some recognized governmental function which, although undertaken by private persons, nevertheless was required to be performed in the same nondiscriminatory manner as would be required in the case of performance by the state. Such contention fails to recognize the basic issue involved. Those cases are concerned not so much with the *nature* of the function involved as they are with *who* is responsible for conduct in performance of that function. If the function is traditionally governmental in nature unquestionably the state is responsible. But this cannot be the only instance wherein the state assumes responsibility—it is also responsible when, as we have stated, it becomes significantly involved in *any* discriminatory conduct. (See *Burton v. Wilmington Parking Authority, supra,* 365 U.S. 715, 722.)

Going to the question of what constitutes significant involvement, it is established that even where the state can be charged with only encouraging discriminatory conduct, the color of state action nevertheless attaches. Justice Black, in writing for the majority in *Robinson v. Florida,* 378 U.S. 153, 156 [84 S.Ct. 1693, 12 L.Ed.2d 771], and for the dissenters in *Bell v. Maryland,* 378 U.S. 226, 334 [84 S.Ct. 1814, 12 L.Ed.2d 822]; asserted that private racial discrimination violated the Fourteenth Amendment once the state in any way discourages integration or instigates or encourages segregation. In *Barrows v. Jackson, supra,* 346 U.S. 249, in holding that a racially restrictive covenant could not constitutionally support a suit for damages, the court explained at page 254: "The result of that sanction by the State would be to encourage the use of restrictive

covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages."

Proscribed governmental encouragement of private discrimination has not been confined to the courts. *Anderson v. Martin*, 375 U.S. 399 [84 S.Ct. 454, 11 L.Ed.2d 430], involved racial labeling of candidates on ballots. Although the state practice did not *require* discrimination on the part of individual voters, it was struck down because it *encouraged* and assisted in discrimination. (See also *Baldwin v. Morgan*, 287 F.2d 750.) Similarly, as early as 1914, in *McCabe v. Atchison T. & S.F. Ry.*, 235 U.S. 151, it was stated at page 162 [35 S.Ct. 69, 59 L.Ed. 169] that the denial of equal railroad facilities to Negroes by a private railroad was unconstitutional state action on the ground that the right to discriminate was authorized by a local statute and that should the carrier perpetrate such discrimination it would be acting under "the authority of a state law." The court reasoned that state *authorization* to discriminate was no less state action than state *imposed* discrimination. (See also *Boman v. Birmingham Transit Co.*, 280 F.2d 531.)

The Supreme Court has recently spoken out against state action which only authorizes "private" discrimination. In *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715, the court had before it the question of whether the State of Delaware discriminated

against a Negro who was excluded from a privately-operated restaurant leased from a public agency of that state. The court stated at page 725 that the state "not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . ." In a concurring opinion Justice Stewart, concluding that the state enactment involved, as construed by the state court, *authorized* discrimination, stated at page 727: "I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid." Even the dissenting justices agreed that if the state court had construed the state enactment as authorizing racial discrimination, there was a denial by the state of equal protection of the laws, Justice Frankfurter stating at page 727: "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment."

In a case involving a fact situation similar to *Burton*, and clearly pertinent to our present inquiry, a Tennessee statute renounced the state's common law cause of action for exclusion from hotels and other public places and declared that operators of such establishments were free to exclude persons for any reason whatever. In the particular circumstances of that case the statute was deemed to bear on the issues "only insofar as" it "expressed an affirmative state policy fostering segregation." The court stated that: "our decisions have fore-

closed any possible contention that such a statute . . . may stand consistently with the Fourteenth Amendment." (*Turner v. City of Memphis* (1962) 369 U.S. 350, 353 [82 S.Ct. 805, 7 L.Ed. 2d 762].)

The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself. Where the state can be said to act, as it does of course, through the laws approved by legislators elected by the popular vote, it must also be held to act through a law adopted directly by the popular vote. When the electorate assumes to exercise the law-making function, then the electorate is as much a state agency as any of its elected officials. It is thus apparent that, while state action may take many forms, the test is not the novelty of the form but rather the ultimate result which is achieved through the aid of state processes. And if discrimination is thus accomplished, the nature of pro-

scribed state action must not be limited by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality.

Contrary to defendants' claims, the state's abstinence from making the decision to discriminate in a particular instance does not confer upon it the status of neutrality in these circumstances. Justice Byron R. White's view of the facts in *Evans v. Newton, supra*, 382 U.S. ...., poses an almost identical issue to that here presented. In his view the majority in *Evans* were not justified on the record in concluding that the City of Macon was continuing to operate and maintain the park there involved after transfer to private trustees, and he grounded his conclusion of proscribed state action on 1905 legislation which did not compel but would nevertheless make it possible for the maintenance of segregated private parks for either white or colored persons. His reasoning and resolution of the issue are stated at page ..... [15 L.Ed.2d at p. 381] in the following language: "As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of the racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restrictions, leaving the validity of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected

private discrimination into state action subject to the Fourteenth Amendment."

From the foregoing it is apparent that the state is at least a partner in the instant act of discrimination and that its conduct is not beyond the reach of the Fourteenth Amendment.

[8] The question remains whether section 26 in whole or in part must be struck down. It is argued, and with merit, that in many applications no unconstitutional discrimination will result and, as noted, it is specifically provided in the amendment that "If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." Does such severability clause save the amendment for piecemeal judicial scrutiny as specific instances of its application arise?

We have recognized that a statute which has unconstitutional applications may nevertheless be effective in those instances where the Constitution is not offended. (See *Franklin Life Ins. Co. v. State of California* (1965), [a]63 Cal.2d 222 [45 Cal.Rptr. 869, 404 P.2d 477].) In the *Franklin* case a taxing statute was held to have been properly applied despite the "possibility of hypothesizing an unconstitutional application of the statute" ([b]P. 227.) But in refusing to declare the statute unconstitutional on its face, we stated at [c]pages

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[a]Advance Report Citation: 63 A.C. 221.
[b]Advance Report Citation: 63 A.C. at p. 226.
[c]Advance Report Citation: 63 A.C. at p. 227.

227-228: ". . . [W]hen the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute [citations]. We have been particularly aware of fomenting such danger of uncertainty in the application of a statute which would inhibit the exercise of a constitutional right (*In re Blaney, supra*) or impose criminal liability. . . . As the United States Supreme Court has said in rejecting an argument that a statute violative of the Fifth Amendment could be constitutionally applied to the case before it, such a 'course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.' [Citations.]" (See also *Thornhill v. Alabama,* 310 U.S. 88 [60 S.Ct. 736, 84 L.Ed. 1093]; *Carlson v. California,* 310 U.S. 106 [60 S.Ct. 746, 84 L.Ed. 1104]; *Jones v. Opelika,* 319 U.S. 103 [83 S.Ct. 890, 87 L.Ed. 1290].)

The instant case, of course, relates directly to the personal liberties distinguished in *Franklin.* This was also true in the case of *In re Blaney* (1947) 30 Cal.2d 643 [184 P.2d 892], referred to in *Franklin.* In the *Blaney* case the "Hot Cargo Act," which declared secondary boycotts unlawful, was struck down on the ground that in some instances sympathetic strikes and other labor coercion could not be constitutionally restrained, although it was recognized that in other instances the statute could be lawfully applied. The court held that the provisions of the statute did not differentiate between the constitutional and unconstitutional applications, stating that "The only way in which such segregation could be made would be by judicial interpretation, first holding that the act as it stands is wholly unconstitutional, but then determining that, by inserting qualifications

and exceptions in the statutory language, a judicially reformed statute might be given some effect." (*In re Blaney, supra,* 30 Cal.2d 643, 655.) We further held in *Blaney* that a severability clause is ineffective to sustain valid portions or applications of a statute unless ". . . the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words," and that where the statute is not so severable ". . . then the void part taints the remainder and the whole becomes a nullity." (P. 655.)

It is immediately apparent from the operative portion of the instant consitutional amendment that it is mechanically impossible to differentiate between those portions or applications of the amendment which would preserve the right to discriminate on the basis of race, color or creed, as distinguished from a proper basis for discrimination. The purported preservation of the right to discriminate on whatever basis is fully integrated and, under the rule of *Blaney*, not severable. Moreover, while we can conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist, any such other purposes clearly "entails the danger of an uncertain or vague future application of the [enactment]" and would thus require that it be struck down. (*Franklin Life Ins. Co. v. State of California* (1965) [d]63 Cal.2d 222, 227 [45 Cal.Rptr. 869, 404 P.2d 477].)

For the foregoing reasons the severability clause is ineffective in the instant case, and the whole of the constitutional amendment must be struck down.

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[d]Advance Report Citation: 63 A.C. 221, 227.

Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application.

The judgment is reversed.

Traynor, *C. J.*, Peters, *J.*, Tobriner, *J.*, and Burke, *J.*, concurred.

WHITE, *J.**—I dissent.

In the final analysis as I view it, the primary issue here presented is whether article I, section 26,[1] added to our state Constitution by the people as an initiative measure (Proposition 14) at the general election of November 3, 1964, by a vote of 4,526,460 to 2,395,747, is a valid exercise of state legislative power in choosing not to regulate the private conduct of residential property owners in the sale or rental of their own private property, even if that conduct is discriminatory on racial or religious grounds, or whether such a legislative choice by the people violates the provisions of the Fourteenth Amendment to the Constitution of the United States or federal law.

While the attack in the briefs on the constitutionality of section 26 encompasses some highly emotional and, I feel, inaccurate charges as to its scope, meaning and effect, such as that by its adoption California has taken "affirmative action of a definite and drastic sort . . . [amounting] to condonation or approval of race dis-

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[1]For convenience this section of the Constitution will be referred to as section 26.

crimination in the sale, leasing and rental of housing . . . ."; that it is an "affirmative declaration that the State will never do anything to prevent or eliminate that discrimination"; that it puts "the State in direct opposition to national policy"; and that its effect is "not merely to repeal the Unruh and Rumford Acts but to authorize racial discrimination in the renting of residential property," I am impressed, from a calm and dispassionate reading of section 26, that it is manifest that actually the measure amounts only to a legislative choice by the people acting through the power reserved to them by article IV, section 1, of our California Constitution that a particular method of attempting to solve the problem of housing for minorities, i.e., the imposition of governmental sanctions on *private residential property owners* shall not now be employed; that the state policy which existed in California prior to 1959 shall be restored; and that there be reserved to the people the exclusive legislative power to change or modify this policy.

Prior to the adoption of the Unruh Act, the California Legislature had chosen not to regulate the conduct of property owners in selecting their buyers or tenants whether or not the choice was based on race, color or creed. By the enactment of the Unruh Act in 1959, the Legislature chose to regulate racial and religious discrimination by persons in "business establishments of every kind whatsoever," including persons engaged in the business of selling or renting residential property, brokers and others. (*Burks v. Poppy Constr. Co.*, 57 Cal.2d 463, 468 [20 Cal.Rptr. 609, 370 P.2d 313]; *Lee v. O'Hara*, 57 Cal.2d 476, 478 [20 Cal.Rptr. 617, 370 P. 2d 321].) From September 1963, until section 26 of

article I became effective, by enacting the Rumford Act, the Legislature chose to regulate specifically such discriminating conduct by owners of most but not all residential property. Then, in November 1964, by enacting section 26 of article I of the Constitution, the people exercised their legislative prerogative and declared that the conduct of a private property owner in refusing to sell or rent his property for whatever reason, should not be regulated by the state but should be left to private self-determination, but the legislation regulating persons other than the property owner when dealing with his own property was left in full force. Nor did the adoption of section 26 interfere with or impair the nearly century-old history of legislation affecting race relations in California commencing as it did in 1872 with the enactment of legislation prohibiting innkeepers and common carriers from discriminating in making their facilities available to all races and creeds (now Pen. Code, § 365), legislation which prohibited discrimination in "public accommodations" (Stats. 1893, ch. 185, p. 220). Those provisions which became sections 51-54 of the Civil Code in 1905 and were amended in 1919 and 1923 (Stats. 1919, ch. 210, p. 309; Stats. 1923, ch. 235, p. 485) guaranteed to "All citizens . . . full and equal accommodations . . . of inns, restaurants, hotels, eating houses . . . barber shops, bath houses, theatres, skating rinks, public conveyances, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." Then in 1925 and succeeding years followed statutory prohibitions against race discrimination in the employment of teachers in California school districts, in civil service, in public works employment,

and assistance programs for needy and distressed persons.

In 1959 the Legislature enacted a measure popularly known as the "Hawkins Act" (Health & Saf. Code, §§ 35700-35741) which prohibited "The practice of discrimination because of race, color, religion, national origin or ancestry in any *publicly assisted housing accommodations*. . . ." (Italics added.) Also adopted at the 1959 legislative session was the California Fair Employment Practice Act (Lab. Code, §§ 1410-1432) prohibiting racial discrimination by certain employers and labor unions, thereby protecting and safeguarding the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, creed, color, national origin or ancestry. None of these guarantees against racial discrimination have been modified or impaired by the challenged constitutional amendment now engaging our attention.

In 1963 the Legislature, in enacting what is commonly known as the "Rumford Act" (Health & Saf. Code, §§ 35700-35744), chose to broaden the policy enunciated in the Hawkins Act, *supra,* with regard to discrimination in housing by extending the provisions of the Unruh and Hawkins Acts to regulate specifically discriminating conduct not only by persons in business establishments of every kind whatsoever, including persons engaged in the business of selling or renting residential property, brokers and others, but regulating such discriminatory conduct by owners of residential property containing more than four units even though not "publicly assisted." It was this latter declared public policy only that was affected by the adoption of section 26.

I am impressed that charges made in the briefs of plaintiffs and amicus curiae that the measure here under consideration was prompted by vicious motives cannot be sustained as against the clear language of the measure itself and the argument that was made to all the voters who cast their ballots at the election.

To discriminate means, insofar as applicable to the instant case, "To make a difference in treatment or favor (of one as compared with others)"; discrimination means ". . . an unfair or injurious distinction." (Webster's New Internat. Dict. (2d ed. 1954).) Contrary to the statutes and laws struck down because of racial discrimination in the cases relied upon by the majority, article I, section 26, now before us, grants equal rights and protection of the law to *any person without regard to race, religion or color,* to sell, lease or rent residential real property to *any person as he chooses.* Where is there discrimination or denial of equal rights to all in this enactment?

But, says the majority opinion, "It is now beyond dispute that the Fourteenth Amendment [Constitution of the United States], through the equal protection clause, secures 'the right to *acquire* and *possess* property of every kind . . . without discrimination on account of color, race [or] religion. . . .' (*Buchanan v. Warley* (1917) 245 U.S. 60, 62-63 [38 S.Ct. 16, 62 L.Ed. 149].) : . . The question of the fact of discrimination by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds

which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

The answer to that is that section 26 does not sanction or condone racial or religious discrimination. It is rather a declaration of neutrality in a relatively narrow area of human conduct: the exercise of the discretion of a property owner to sell or not to sell or to rent or not to rent his residential property.

Since it is conceded that "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment" (*Civil Rights Cases,* 109 U.S. 3, 11 [3 S. Ct. 18, 27 L.Ed. 835]), it seems to me that any sound analysis of the constitutionality of section 26 must begin with the well established, but frequently ignored premise that the prohibitions of the Fourteenth Amendment are directed at *conduct for which the state is responsible or significantly involved* and do not extend to private conduct however wrongful, discriminatory, unethical or violative or what may be regarded by many as the real philosophy of human relations. In other words, the state must be held *responsible* for denying a citizen the equal protection of the law.

The major constitutional attack on section 26 as contained in the majority opinion would seem to begin with the fallacious assumption of the existence of a federal constitutional right to acquire property without racial discrimination from another citizen and leaps to the conclusion that the failure of the state to enforce that *constitutional right* inevitably involves the state in the constitutionally prohibited discrimination so significantly as to violate the Fourteenth Amendment. Nothing in the federal Constitution gives to one citizen the right to acquire property from another citizen who does

not wish to sell it to him even if the refusal to sell is based on race or religion. A federal constitutional right arises only if the state is responsible for such discriminatory conduct or to some significant extent has been found to have become involved in it.

I am persuaded that in the absence of significant state involvement, the refusal of a property owner to sell or lease his property upon the grounds of race raises no federal constitutional question. As declared by the United States Supreme Court in the leading case of *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 722 [81 S.Ct. 856, 6 L.Ed.2d 45]: "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some *significant extent* the state in any of its manifestations has been found to have become *involved* in it." (Italics added.)

And as was said by Mr. Justice Harlan in his concurring opinion in *Peterson v. Greenville* (1963) 373 U.S. 244, 249-250 [83 S.Ct. 1119, 10 L.Ed.2d 323, 327], "The ultimate substantive question is whether there has been 'State action of a particular character' (*Civil Rights Cases, supra* [109 U.S. at p. 11])—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

"This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. *Freedom of the individual to choose his associates or his neighbors, to use and*

dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. *Also inherent in the concept of State action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.*" (Italics added.)

And since section 26, here in question, involves *residential* property, the views of Mr. Justice Douglas in his concurring opinion in *Lombard v. Louisiana,* 373 U.S. 267 at pp. 274-275 [83 S.Ct. 1122, 10 L.Ed.2d 338, at p. 343] (one of the 1963 sit-in decisions) are cogent:

"If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter a private precinct they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's

home is his castle is basic to our system of jurisprudence."

Plaintiffs urge that the Constitution of California (article I, section 1) declares that among the inalienable rights guaranteed to all persons is the right of ". . . acquiring, possessing and protecting property." But these rights not only include the right to acquire and possess property but also the right to dispose of it freely (*Tennant v. John Tennant Memorial Home,* 167 Cal. 570, 575 [140 P. 242]) and in any way not forbidden by law (*People v. Davenport,* 21 Cal.App.2d 292, 295-296 [69 P.2d 862]). Certainly the constitutional right to own and possess property includes the right to sell to one of the owner's own choice subject only to a valid exercise of the police power for the protection of all the people. Never to my knowledge has article I, section 1, of our state Constitution been construed to give any person the right to acquire property from another who did not wish to sell it to him, however arbitrary his reasons might be. Section 1 of article I, when read with section 26, now means exactly what it meant prior to the adoption of legislation (the Unruh and Rumford Acts, *supra*) conferring a right to acquire property in certain instances without discrimination on grounds of race or religion. It is, therefore, erroneous for plaintiffs to say that the effect of section 26 is to "take from negroes but not from whites, some part of the inalienable rights granted by section 1." Under section 26 all persons of all races and creeds have exactly the same rights they have always had under section 1 in the absence of legislation and, to the extent any rights are restricted by section 26, such restrictions are applicable to *all* persons.

As I view it, the philosophy and rationale of article I, section 26, is epitomized by Mr. Justice Black, long an exponent of an expansive interpretation of the guarantees of the Fourth Amendment, when writing for himself and Justices Harlan and White in the dissent filed in the case of *Bell v. Maryland* (1964) 378 U.S. 226, 330-331 [84 S.Ct. 1814, 12 L.Ed.2d 822, 858] wherein he said: ". . . the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to 'inherit, purchase, lease, sell, hold and convey' property, prohibits a State, whether through its Legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley v. Kraemer, supra,* 334 U.S. at 19 [9 L.Ed. at 1183, 3 A.L.R.2d 441]. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' (*Buchanan v. Warley, supra,* 245 U.S. at 74 [62 L.Ed. at 161, L.R.A 1918C 1201].) *This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses NOT to sell to a particular person or NOT to admit that person,* as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of

law, that is 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use." (Italics added.)

As to the view of the majority that affording a property owner judicial recognition and enforcement of his property rights in the sale or leasing of residential property, on the ground that his motives in selling or leasing were based upon race, color or creed, spells out significant state involvement is not, I submit, supported by statutory or decisional law. This I say because such denial, *in the absence of a valid regulatory statute,* would deprive such an owner of his property without due process of law because a property owner, as heretofore pointed out, has a constitutionally protected right to use and dispose of his property in whatever manner he wishes, not inconsistent with valid legislation. (*Buchanan v. Warley* (1917) 245 U.S. 60 [38 S.Ct. 16, 62 L.Ed. 149]; *Richmond v. Deans* (1930) 281 U.S. 704 [50 S.Ct. 407, 74 L.Ed. 1128].)

In other words, since section 26 does not otherwise offend the Fourteenth Amendment, the mere recognition or enforcement by a court of—for instance—the termination of a month-to-month tenancy in accordance with its terms does not render the state responsible for the motives of the landlord.

In the instant case it is clear that section 26 has effectively repealed inconsistent portions of the Unruh and Rumford Acts, *supra.* Plaintiffs are, therefore, in the position of demanding that the courts refuse to recognize or actually prohibit conduct by defendants which is not now proscribed by any legislation.

When the Legislature adopted the Unruh, Hawkins and Rumford Acts, it was making a choice to impose sanctions upon certain owners of certain types of residential property if they refused to sell or lease it upon grounds of race, color, creed or national origin of the prospective purchasers. Certainly it cannot logically be contended that the Legislature would be barred from repealing those portions of the aforesaid statutes directing sanctions at private property owners in dealing with their own property and substitute therefor another program. If the Legislature has such discretion, then under the Constitution of this state, it cannot fairly be said that the people do not.

I am persuaded that none of the types of state involvement which have been held sufficient to invoke the Fourteenth Amendment in the cases relied upon in the majority opinion can be found in the California amendment here under attack. In fact, the very essence of section 26 is to remove the influence of the state from the formulation of private decisions affecting the sale or rental of privately owned residential property.

Plaintiffs seemingly contend and the majority opinion infers that all conduct which the state has the power to prohibit but which it does not prohibit is conduct for which the state is responsible for Fourteenth Amendment purposes. However, the Supreme Court of the United States has consistently and without exception preserved the fundamental and long recognized principle that the Fourteenth Amendment does not reach private conduct however arbitrary or unenlightened it may be except only where such private conduct involves the performance of a traditional governmental or public function such as the conducting of elections, government

of a town, the furnishing of public services under a monopoly granted by government, private zoning through restrictive covenants or operation of municipal parks. There is no suggestion in the cases now before us that the residential property involved is or ever has been owned, operated, financed or maintained by a governmental entity. Here the property is private residential property owned, operated and maintained by the private persons who were defendants in the court below.

Accordingly, the precise holding of the Supreme Court of the United States in the recent case of *Evans v. Newton* (1966) [a]382 U.S. ..... [86 S.Ct. ....., 15 L.Ed.2d 373], based as it was on the continued municipal operation and maintenance of the property devoted to public use as a park, affords no comfort or support whatever to the attack on section 26. Just as the statute in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 [81 S.Ct. 856, 6 L.Ed.2d 45], could not provide the basis for a violation of the Fourteenth Amendment, so also section 26 does not provide the basis for a judgment that plaintiffs' constitutional rights have been violated.

Admittedly, since government is not an exact science, one of the important factors deserving consideration concerning existing evils and the remedy therefor is prevailing public opinion. This is especially true when such public opinion has been reached after mature deliberation and is both deep-seated and widespread. By an overwhelming margin of popular votes, the people of California have made the same choice on the issue before us as has been made in 32 of our sister states, and our state still has more extensive regulations

[a]Advance Report Citation: 34 U.S.L. Week 4078.

against racial discrimination than exist in 41 states of the union.

To analyze in detail the recent U.S. Supreme Court decision in *Evans v. Newton, supra*, would unduly prolong this already lengthy dissenting opinion. Suffice it to say that it is the most recent of a long line of United States Supreme Court decisions dating from the *Slaughter-House* cases in 1873 and *Civil Rights* cases in 1883 in which that court has steadfastly limited the sphere of the Fourteenth Amendment to conduct of the state or conduct for which the state can fairly be held responsible. In an unbroken line of decisions that court has uniformly reiterated the principle that individual invasion of individual rights is beyond the regulatory ambit of the Fourteenth Amendment.

I do not justify discriminatory private conduct nor approve the state's failure to forbid it, but I submit it is not the province of this court by judicial fiat to enact legislation, a function reserved to the People or the Legislature.

As was stated by Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Douglas, in *Bell v. Maryland, supra* (1964) 378 U.S. 226 at p. 313 [84 S.Ct. 1814, 12 L.Ed.2d 822], arguing for a federal right to equal access to public accommodations which the state may not infringe by judicial action against trespassers: *"Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private as-*

sociation are themselves constitutionally protected liberties." (Italics added.)

Discrimination because of race or religion, political beliefs or other irrational grounds influences the conduct of individuals and society in many ways with as many effects. In virtually all but the *artificially framed racial* test case, such discriminations will, if present, be but one of many motivating factors. This, because we must realize that an innate quality of our very nature is that of selectivity. It manifests itself in our human behavior from the time we attain the use of reason practically until we draw our final breach. If, as conceded by plaintiffs in their briefs and at the oral arguments, and recognized in the majority opinion, we may be selective in choosing our associates in clubs, fraternal organizations, social intimates and business partners because of social or religious prejudice, then by what force of logic or justice should the state be permitted to assert its coercive powers to take from the individual property owner the decision as to who shall be admitted to that property as a resident neighbor or to whom the owner thereof may sell it, save by the law of the land? Yet, this is exactly what the state would be doing in denying to a property owner judicial recognition and enforcement of his private contract and property rights upon the ground that his motives in seeking judicial relief are based upon race, color or creed. By reason of the repeal of certain provisions of the Rumford and Unruh Acts by the enactment of section 26, there is no valid existing regulatory statute depriving an owner of residential property of absolute discretion in the sale or rental thereof. Therefore, since a property owner has a constitutionally protected right to dispose of and use his

property in whatever manner he wishes *not inconsistent with valid legislation,* to deny such owner judicial relief would deny to him the equal protection of the laws in violation of the First, Third, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The majority opinion relies upon the case of *Shelley v. Kraemer,* 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441] as being analogous to the one with which we are here concerned. In *Shelley,* property subject to a racially restrictive convenant had been conveyed by a white owner to a Negro. Owners of a nearby property instituted an action to restrain Shelley, the Negro buyer, from taking possession, and to have title revested in the grantor. This case involved a "willing seller—willing buyer" relationship, and judicial enforcement of the restrictive covenant would have compelled the sellers to discriminate against their wishes. If the *Shelley* case stands for anything, it stands for the philosophy of section 26, by sustaining the freedom of sellers to select whomsoever they choose to buy their property, notwithstanding racial covenants. The key to both *Shelley* and *Barrows v. Jackson,* 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586] (affirming *Barrows v. Jackson,* 112 Cal. App.2d 534 [247 P.2d 99]), where the courts refused to recognize a right to damages in neighboring property owners seeking recovery after breach of a racially restrictive covenant by a willing seller to a minority group buyer, is that, were the courts to give recognition to such a cause of action they would not be acting neutrally but actually would be compelling discrimination by a seller who did not wish to discriminate.

Neither case supports the proposition that a state court would have been under a constitutional mandate to compel an owner to sell to a Negro if he preferred to adhere voluntarily to his restrictive agreement. Indeed, the court in *Shelley* expressly concluded "that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment." (334 U.S. at p. 13.) Later it noted that "*these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.*" In short, "but for the active intervention of the state courts, . . . petitioners would have been free to occupy the properties in question without restraint." (334 U.S. at p. 19.) (Italics added.)

Plaintiffs' arguments and the majority opinion based on the *Shelley* case simply do not apply to the cases now before this court where an unwilling seller or lessor is involved. As pointed out in *Shelley,* the court there was asked to enforce an agreement which denied to members of one race rights of acquisition, ownership, occupancy and disposition of property rights that were enjoyed as a matter of course by other citizens of a different race or color. Article I, section 26, of the California Constitution, now before us, applies to property owners without regard to race or color and, accordingly, the conduct condemned in the foregoing cases is not present here.

In support of its holding that a discriminatory act even where the actor is a private citizen motivated by purely personal interests, may fall within the proscrip-

tion of the equal protection clause if state or local government or the purpose of state or local government is significantly involved, the majority opinion herein cites the case of *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 722 [81 S.Ct. 856, 6 L.Ed.2d 45]. This is a leading example of those cases presenting circumstances in which the state has leased state facilities either in whole or in part to a private person or group for carrying on activities or offering services to the public which the government may, but is not obligated to provide.

In *Burton,* the court found significant state involvement in restaurant discrimination because the land and building were publicly owned and had been acquired for "public use." The premises were leased to a private operator but as a part of a publicly owned parking lot where the rental income from the restaurant was necessary for the financial stability of the parking operation.

The *Burton* case and those akin to it simply hold that if a state undertakes to provide or contribute to providing these services, it must obey the strictures of the Fourteenth Amendment, whether the state itself operates the facilities or limits its activities to leasing or financing the facilities operated by private persons but performing the same services.

None of the elements of state involvement present in the *Burton* case—the "white primary" cases where the holding was that the state could not escape the provisions of the Fourteenth Amendment by delegating to a private agency functions which were inherently governmental in character; or the so-called "sit-in" cases involving either municipal ordinances requiring racial dis-

crimination, where the court emphasized that it *was not* confronted with a private policy of discrimination or with mere enforcement by a state court of a state criminal trespass statute, but where the state invoked the statute to promote racial discrimination—is possible under the California constitutional provision here under attack. The very essence of section 26 is to avoid state involvement in private decisions in the sale or rental of privately owned residential property.

Plaintiffs rely on the case of *Abstract Investment Co. v. Hutchinson,* 204 Cal.App.2d 242 [22 Cal.Rptr. 309], cited in the majority opinion. In this case, the District Court of Appeal reversed a judgment for the plaintiff in an unlawful detainer action on the ground that the trial court had erred in refusing to admit evidence in support of certain affirmative defenses which alleged that plaintiff was terminating the tenancy solely because of the Negro defendant's race. As indicated by excerpts on pages 247 through 251 of the *Abstract* case, the court was holding that under the law *as it then existed* racial discrimination was a ground for a court refusing to entertain or sustain a complaint for unlawful detainer because racial discrimination was contrary to the public policy declared inter alia in our state Constitution and in the Unruh and Hawkins Acts adopted by our state Legislature.

The extent of the significance attached by the District Court of Appeal to these state laws is reflected in its extensive discussion at pages 251 through 255 of the opinion concerning the constitutionality and applicability of these statutes.

To the extent that the court in *Abstract* relied upon state antidiscrimination legislation it should not be ap-

plied to cases such as the instant one involving as it does the leasing of residential property because of non-regulation by the state embodied in section 26. Likewise, to the extent *Abstract* was based upon the public policy provisions of the state Constitution, the holding was overruled by the adoption of section 26, here under attack insofar as the sale or leasing of residential property is concerned.

As I view it, another important issue presented to us is whether in the several states a person has a right of action under the Fourteenth Amendment to obtain judicial relief against another person who refuses on grounds of race to deal with him in the sale or leasing of private residential property. If he has such a right of action, then I agree that neither section 26, nor any statute, decision of the court, nor any vote of the electorate can properly deny it.

Also, I certainly agree that conduct based on racial prejudice is injurious, that it is irrational, uncharitable, unenlightened and arbitrary. What I disagree with is the essential foundation of plaintiffs' claim that racial discrimination practiced by private owners of private residential housing is directly forbidden by the Fourteenth Amendment. However delicately or artfully plaintiffs phrase the problem, whether in terms of "state responsibility" for not prohibiting what it has the power to prohibit, or of "abdication of state responsibility" or of "purposefully permitting" "authorizing" or "encouraging" discriminatory conduct, none of these words is so magic as to obscure the plain fact that the only conduct which has injured these plaintiffs is the conduct of private citizens with respect to their own private residential property. I submit the state cannot fairly

be held responsible for that conduct unless it has a duty under the Fourteenth Amendment to prohibit such conduct, and that a state has that duty only if the Fourteenth Amendment contains a self-executing cause of action for racial discrimination in private housing.

No single case relied upon by plaintiffs or cited in the majority opinion holds or even suggests that there is such a cause of action under the Fourteenth Amendment. On the contrary, the authorities are unanimous in holding that no such federal constitutional cause of action now exists, that the Fourteenth Amendment does not extend and that sound reasons forbid its extension to the private conduct here involved.

Furthermore, recourse to the legislative history and debates in the Congress at the time the Fourteenth Amendment was under consideration clearly establishes that the amendment was designed to correct the unjust legislation of some of the states to the end that the law which operates upon one man shall operate equally upon all. This legislative history indicates that the purpose of the amendment was to prohibit *state* legislation such as was adopted in some of the states following the Civil War preventing Negroes from purchasing or leasing land, buying or selling other property or even making contracts precisely as by the federal Constitution, a state is forbidden to pass an "ex post facto law."

The Thirteenth Amendment had just been adopted inhibiting slavery but leaving the freedom of the emancipated people in the power of the states. Hence the necessity of the prohibition to the states. By the very language of the amendment it is manifest that its entire structure rests on the discrimination made by laws of the various states.

In an area concerned solely with the rights and obligations of citizens toward each other, the people have a right either directly or through their elected representatives to regulate that kind of conduct or not to regulate it. The adoption of section 26 of the Constitution of California evidences the decision of the people not to regulate such conduct in the sale or leasing of private residential property and extends such freedom of action to all persons, unrestricted by racial or religious barriers.

I would affirm the judgment.

McCOMB, J.—I concur with the views expressed by Mr. Justice White in his dissenting opinion.

The people of California, under the legislative power reserved to them (Cal. Cons., art. IV, § 1)[1] have, by enacting section 26 of article I, guaranteed to all persons, regardless of race, color or religion, equal rights in their property.

Every person, regardless of his race, color or religion, as an incident of the right to own, possess and enjoy real property, has the right to sell or lease, or to decline to sell or lease, his property to anyone regardless of the race, color or religion of the person with whom he is dealing.

Unless we are to become a socialistic state in which the people have only limited, if any, rights to privately own, possess, enjoy and/or dispose of property, real or

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[1]Article IV, section 1, reads: "The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature."

personal, the proposed decision is obnoxious to our basic form of government.

The people of California, by enacting section 26, article I, of the Constitution, have made it altogether clear that they wish to retain the right to own, possess and enjoy private ownership of property.

By its decision, our court has effectively nullified the will of the people, from whom it derives its power.

I completely disagree with the majority that the subject enactment encourages discriminatory conduct. To me, section 26 is a restatement of a fundamental principle that all property owners have a right to enjoy or to dispose of their property in any lawful manner, in their absolute discretion.

Memorandum Opinion of the Superior Court of Los Angeles County.

Superior Court of the State of California, for the County of Los Angeles.

Wilfred J. Prendergast and Carola Eva Prendergast Plaintiffs vs. Clarence Snyder, Defendant. No. 851387.

Filed March 15, 1965.

MEMORANDUM OF DECISION

Plaintiffs, who are husband and wife, occupy an apartment under a month-to-month tenancy in a seven unit apartment building owned by defendant. Their tenancy commenced August 1, 1964, and on December 1, 1964, they were served with a 30 day notice pursuant to Section 1946 of the Civil Code requiring them to quit and deliver up possession of the premises to defendant. The sole reason for defendant's decision to terminate the tenancy was that plaintiff husband is a Negro.

This action was brought by plaintiffs to enjoin defendant landlord from evicting them because of race.

Defendant has cross-complained for declaratory relief. He seeks a judicial declaration that plaintiffs' tenancy and right of occupancy has been lawfully terminated even if racial discrimination was the reason therefor, that defendant is entitled to immediate possession of the premises, and that he is entitled to have a court recognize and enforce termination of plaintiffs' tenancy and restoration of the premises to him even if he is motivated solely by racial prejudice.

Defendant made a motion for a summary judgment dismissing plaintiffs' action and granting him the relief requested in his cross-complaint. Affidavits have been filed indicating that another tenant has vacated her apartment and others will do so if plaintiffs remain because those tenants do not want to live in a building occupied by a Negro, and projecting an economic loss to defendant if plaintiffs do not vacate the premises.[1] Defendant's motion for summary judgment, together with plaintiff's application for a preliminary injunction, has been submitted for decision.

In opposition to defendant's motion and in support of their own, plaintiffs rely on the Unruh Civil Rights Act which, among other things, prohibits racial discrimination in the rental of real property in certain circumstances.[2] Defendant, in turn, relies upon Section 26,

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[1]The cross-complaint similarly alleges that although defendant intended to live in the building in the future, he does not want to do so if a Negro continues in occupancy.

[2]Civil Code, Sec. 51, provides: "All persons . . . are free and equal, and no matter what their race, color, . . . are entitled to the full and equal accommodations . . . in all business establishments of every kind whatsoever." Section 52 states that "whoever denies . . . or makes any discrimination . . . on account of color, race . . . contrary to the provisions of Section 51 . . . is liable . . . for damages.

(This footnote is continued on the next page)

Article I, of the California Constitution,[3] which if valid, admittedly repeals the Unruh Act insofar as the latter imposes sanctions on the owners of real property who discriminate on the basis of race or color in the rental thereof.[4] Defendant contends that there is now no statutory or common law cause of action in California against a property owner for his refusal to rent or to permit continued occupancy of his property, whatever his motives, and, accordingly, that there is no legal impediment to his evicting plaintiffs on grounds of race. Plaintiffs counter with the contention that Section 26 of Article I is invalid by reason of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[5] They further contend that judicial enforcement of defendant's decision to terminate plaintiffs' tenancy on racial grounds would deny plaintiffs rights guaranteed them by the Equal Protection Clause. Inasmuch as the latter contention has merit, it is unnecessary to consider the former.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits

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Swann v. Burkett, 209 Cal. App. 2d 685, holds that an apartment building such as that involved herein is a "business establishment" within Section 51.

[3]"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly the right of any person, who is willing or desirous to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

Section 26, Article I, was known as Proposition 14 on the ballot at the last General Election.

[4]Other anti-discriminatory housing legislation, such as the Rumford Act (Health & Safety Code, Secs. 35700-35744), would also be repealed.

[5]"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

racial discrimination by the state, but it does not prohibit such offensive conduct by a private individual "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." (Burton v. Wilmington Parking Authority, 365 U.S. 715; Peterson v. Greenville, 373 U.S. 244; Shelley v. Kraemer, 334 U.S. 1; Civil Rights Cases, 109 U.S. 3.) It has been held that the prohibited involvement occurs when a state court enforces the racial discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (Shelley v. Kraemer, supra; Barrows v. Jackson, 346 U.S. 249; Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242; *cf* In re Laws, 31 Cal. 2d 846; Clifton v. Puente, 218 S.W. 2d 272 (Texas); State v. Brown, 195 A. 2d 379 (Dela.).) *Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242, specifically holds that judicial enforcement of the eviction of a tenant on racial grounds is prohibited by the Equal Protection Clause. There, a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. The tenant's attempt to set up the defense that he was being evicted because of race was denied by the trial court. The District Court of Appeal reversed, holding that the tenant should have been permitted to show racial discrimination by his landlord "which if proven would bar the court from ordering his eviction because such 'state action' would be violative of" the federal Constitution. (Supra, p. 255).

It would seem that the decision in the *Abstract* case is determinative of the present case. However, defend-

ant contends that case is not controlling because, he claims, it represents an erroneous interpretation or misapplication of decisions of the United States Supreme Court in the restrictive covenant cases, principally *Shelley v. Kraemer*, 334 U.S.1, and *Barrows v. Jackson*, 346 U.S. 249. Those cases held that the Equal Protection Clause interdicts judicial enforcement by state courts of restrictive covenants directed against use or occupancy of real property by non-Caucasians. The *Shelley* case involved an action in equity to enforce such a covenant by enjoining a Negro purchaser from occupying the purchased property. The *Barrows* case involved an action for damages against a white vendor for breach of covenant in calling to a Negro. Defendant argues that since the Shelley and sellers to discriminate against their wishes, and that the Supreme Court decisions in those cases must, therefore, be limited to situations where the 'state action' coerces the private decision to discriminate. The facts and language in Shelley and Barrows, as well as in subsequent cases, would appear to challenge the limitation contended for by defendant.[6] Although state action which coerces discrimination by private individ-

[6]The private decisions to disciminate which were sought to be enforced in Shelley and Barrows long antedated the 'state action'. In *Shelley v. Kraemer*, the Court stated: "Here the particular patterns of discrimination and the areas in which restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. * * * These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. * * * Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement." The opinion in *Barrows v. Jackson*, 112 Cal. App. 2d 534, summarized Shelley v. Kraemer as follows: "The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation."

uals is unquestionably prohibited, it appears that state participation in or active support of a private policy of racial discrimination, which participation or support does not have the effect of coercing the private decision to discriminate, is equally prohibited. (Burton v. Wilmington Parking Authority, 365 U.S. 715; Penn. v. Board of Trusts, 353 U.S. 230; Griffin v. Maryland, 378 U.S. 130; *cf.* Marsh v. Alabama, 326 U.S. 501; Cooper v. Aaron, 358 U.S. 1; Simkins v. Mose H. Cone Memorial Hospital, 323 F. 2d 959; Jackson v. Pasadena School District, 59 Cal. 2d 876.)[7]

But regardless of whether or not the decision of the District Court of Appeal in *Abstract Investment Co. v. Hutchinson,* supra, is sound, this court is required to follow it in the absence of contrary decisions by state appellate courts of equal or greater authority or by the United States Supreme Court. No such state court decisions have been cited.[8] A number of recent decisions of the United States Supreme Court arising out of the "sit-in" demonstrations have been cited by defendant in support of his contention that judicial enforcement by state courts of private racial discrimination does not of itself constitute prohibited state action. The fact is that

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[7]In *Griffin v. Maryland*, supra, it was said: "The Board of Trust case must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

[8]*Housing Authority v. Cordova,* 130 Cal.App. 2d 883, which states by way of dictum that a landlord may refuse "to permit the continued occupancy of his premises by persons of a particular race," is an opinion of the Appellate Department of the Los Angeles Superior Court, and, does not discuss the constitutional question. *Hill v. Miller,* which holds that judicial enforcement of a tenant's eviction on grounds of race does not violate the Fourteenth Amendment, is an opinion of the Sacramento Superior Court, and, makes no reference, in this connection, to the *Abstract* case.

none of those decisions so hold. The cases relied upon are *Peterson v. Greenville,* 373 U.S. 244, *Lombard v. Louisiana,* 373 U.S. 267, *Griffin v. Maryland,* 378 U.S. 130, and *Robinson v. Florida,* 378 U.S. 158, each of which reversed state criminal trespass convictions of persons who were denied service in or equal access to places of public accommodation and who refused to leave the private premises when requested. Although the state action condemned in each of those cases was legislative, executive or administrative,[9] no approval of the judicial activity was indicated. The Supreme Court has expressly abstained from determining "whether the Fourteenth Amendment . . . operates of its own force to bar criminal trespass convictions where . . . they are used to enforce a pattern of racial discrimination" in places of public accommodation.[10]

Defendant's attempt to distinguish the *Abstract* case on the basis that it "could have been decided" on the

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[9]In *Peterson v. Greenville,* supra, prohibited state involvement was found in the existence of a city ordinance which required segregation in eating places. In *Lombard v. Louisiana,* supra, public statements by city officials that attempts to secure desegregated service were not in the public interest and would not be permitted constituted the offending state action. In *Griffin v. Maryland,* supra, state participation or involvement resulted from enforcement of a private amusement park's policy of discrimination by an employee of the park who was also a deputy sheriff. In *Robinson v. Florida,* supra, regulations of the board of health requiring separate restroom facilities where white and colored persons were accommodated were held to have involved the state in the private discrimination.

[10]Hamm v. Rockhill, ... U.S. ...., 13 L. Ed 2d 300. See also Robinson v. Florida, 378 U.S. 158; Garner v. Louisiana, 368 U.S. 157; Bell v. Maryland, 378 U.S. 226. But see State v. Brown, 195 Atl. 2d 379 (Dela)

It is true that three members of the Supreme Court, Justices Harlan, Black and White, are of the opinion that such convictions are permissible. See dissenting opinion of Justice Black in Bell v. Maryland, supra. But three other members, Chief Justice Warren, Justices Douglas and Goldberg, are of the contrary opinion. See concurring opinions of Justice Douglas and Justice Goldberg in Bell v. Maryland, supra.

ground that the conduct of the landlord therein was in violation of the Unruh Act must also fail. The opinion of the District Court of Appeal in that case expressly stated that it could not find "that the discrimination complained of constituted a violation of the Unruh Act." (204 Cal. App. 2d 242, 255)

Finally, defendant contends that to refuse judicial enforcement of a landlord's decision to terminate a tenancy because he is motivated by racial discrimination, would deny him due process and equal protection of the laws. A similar contention was rejected in *Shelley v. Kraemer* with the remark that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." (Supra at p. 22; See also Barrows v. Jackson, supra; Abstract Investment Co. v. Hutchinson, supra at p. 251)

Abstract Investment Co. v. Hutchinson, supra, requires a holding that when a property owner who devotes his property to the business of rental for occupancy by others affirmatively attempts to invoke the coercive power of a court to effectuate or secure his private racial discriminatory purpose in seeking to oust the occupant, the Equal Protection Clause prohibits the court from assisting him in enforcing his private policy of racial discrimination and precludes judicial enforcement of the attempted eviction. It follows that if Section 26, Article I, on the California Constitution could be construed as requiring a court at the request of a landlord to enforce his decision to evict a tenant because of race and recover possession of the premises, it could not be given effect. It is unnecessary, in this case, however, to determine the question of the validity of Sec-

tion 26, of Article I, in any other application or circumstances not presented by this case.

Defendant's motion for summary judgment is denied. Since there is no suggestion that defendant intends, at the present time, to seek judicial enforcement of his discriminatory purpose, other than by his request for declaratory relief herein, there appears to be no occasion to grant plaintiffs' application for a prelimiary injunction, and the application is therefore denied.

Majority Opinion of the California Supreme Court.

[L.A. No. 28422. In Bank. May 10, 1966.]

Wilfred J. Prendergast et al., Plaintiffs, Cross-defendants and Respondents, v. Clarence Snyder, Cross-complainant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Katz, Judge. Affirmed.

Action to enjoin defendant from evicting plaintiffs from rented premises by reason of plaintiff husband's race and cross-action seeking a declaration that termination of the tenancy was not invalid. Judgment for plaintiffs entered on defendant's motion for summary judgment on the cross-complaint, affirmed.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., Charles S. Battles, Jr., for Defendant, Cross-complainant and Appellant.

A. L. Wirin and Fred Okrand for Plaintiffs, Cross-defendants and Respondents.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Richard A. Bancroft, Jack Greenberg, Robert

M. O'Neil, Joseph B. Robison, Sol Rabkin, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr., Howard Nemerovski, John G. Clancy and Ephraim Margolin as Amici Curiae on behalf of Plaintiffs, Cross-defendants and Respondents.

PEEK, *J.*—Defendant landlord appeals from a judgment for plaintiff tenants entered upon defendant's motion for summary judgment on his cross-complaint for declaratory relief.

Plaintiffs Prendergast are husband and wife, respectively a Negro and a Caucasian. Prior to their marriage Mrs. Prendergast rented from defendant an apartment in his seven-unit dwelling on an oral, month-to-month tenancy. Mr. Prendergast moved into the apartment with his wife following their marriage, and defendant thereupon purported to terminate plaintiffs' tenancy in the exercise of his claimed right "(1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, and (2) to acquire, use, enjoy and dispose of his property in any manner he may choose which is not prohibited by statute, ordinance or other legislation."

The instant action was commenced by plaintiffs to enjoin defendant from evicting them by reason of plaintiff husband's race. In his cross-complaint defendant sought a declaration that his termination of the tenancy was not invalid, that defendant is entitled to possession of the premises, that his refusal to rent to any particular person or persons or terminate such rental would not be unlawful even if his unexpressed reason therefor was the race or religion of the person or persons involved, and that defendant has a right to

have a court of law recognize and enforce the termination of plaintiff's tenancy. Defendant relies upon article I, section 26 of the Constitution, which provides in pertinent part: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The trial court, in a memorandum opinion, held that the Fourteenth Amendment, through the equal protection clause, proscribed discrimination based on race where directly practiced by a state and also if practiced by private persons where "to some significant extent the State in any of its manifestations has been found to have become involved in it," citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 [81 S.Ct. 856, 6 L.Ed.2d 45], and *Shelley v. Kraemer*, 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441]. The court then noted that "the prohibited involvement occurs when a state court enforces the racial discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (*Shelley v. Kraemer, supra; Barrows v. Jackson*, 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586]; *Abstract Investment Co. v. Hutchinson*, 204 Cal.App.2d 242 [22 Cal.Rptr. 309].)"

In the *Abstract Investment Co.* case a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. A judgment for plain-

tiff was reversed on the ground that it was prejudicial error to deny defendant an opportunity to show that he was being evicted solely because of his race. The court held in that case that if defendant could have proved racial discrimination it "would bar the court from ordering his eviction because such 'state action' would be violative of" the federal Constitution. (*Abstract Investment Co. v. Hutchinson, supra,* 204 Cal.App.2d 242, 255.)

The trial court in the present case concluded that it was bound by the *Abstract Investment Co.* case and, further, that if article I, section 26, which was adopted following the decision in that case, could be construed as requiring a court to enforce a landlord's decision to evict a tenant because of race, it could not be given that effect for federal constitutional reasons.

Although it appears that the instant case is factually indistinguishable from the *Abstract Investment Co.* case, we are not required to rely upon that case in affirming the judgment herein. We have held today that article I, section 26, upon which defendant relies for the declaration of his rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (*Mulkey v. Reitman,* [a]*ante,* p. ..... [..... Cal. Rptr. ....., ... P.2d .....].) For that reason, as well as those relied upon by the trial court, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

Traynor, *C.J.*, Peters, *J.*, Tobriner, *J.*, and Burke, *J.*, concurred.

WHITE, *J.**—I dissent.

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[a]Advance Report Citation: *Ante,* p. 557.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

For the reasons stated in my dissent in *Mulkey v. Reitman,* [b]*ante,* p. ....., [..... Cal.Rptr. ....., ... P.2d ....], I would reverse the judgment.

McComb, *J.*, concurred.

Majority Opinion of the California Supreme Court.

[Sac. No. 7675. In Bank. June 8, 1966.]

Clifton Hill, Plaintiff and Appellant, v. Crawford Miller, Defendant and Respondent.

[On rehearing after judgment reversed (64 A.C. 598, 50 Cal.Rptr. 908). Judgment of superior court affirmed.]

APPEAL from a judgment of the Superior Court of Sacramento County. William M. Gallagher, Judge. Affirmed.

Action to restrain a landlord from evicting a Negro tenant solely because of his race. Judgment of dismissal after demurrer was sustained without leave to amend affirmed.

Colley & McGhee, Nathaniel S. Colley, Milton L. McGhee, Stanley Malone and Clarence B. Canson for Plaintiff and Appellant.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Richard A. Bancroft, Jack Greenberg, Joseph B. Robison, Sol Rabkin, Robert M. O'Neil, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr., Howard Nemerovski, John G. Clancy, Ephraim Margolin, George T. Altman and Ray R. McCombs as Amici Curiae on behalf of Plaintiff and Appellant.

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[b]Advance Report Citation: *Ante,* p. 557.

Harry A. Ackley, Robert J. Cook and John M. Beede for Defendant and Respondent.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., and Charles S. Battles, Jr., as Amici Curiae on behalf of Defendant and Respondent.

PEEK, *J.*—Plaintiff tenant appeals from a judgment for defendant landlord entered upon the sustaining of a demurrer without leave to amend in an action for an injunction to restrain defendant from evicting plaintiff, a Negro, solely because of his race.

[1] It appears from the complaint and is deemed admitted by the demurrer that plaintiff occupies, as a tenant, residential property owned by defendant; that defendant caused to be served upon plaintiff a notice to quit possession and terminate the tenancy; that the notice was given only for the reason that defendant plans to exclude Negroes from the rental of residential real property owned by defendant; that defendant intends to follow the notice with an action for unlawful detainer in the appropriate municipal court; that he asserts he is entitled to discriminate in the rental of his property in reliance on article I, section 26, of the California Constitution;[1] that plaintiff has a right not to be subjected to such discrimination by virtue of the Fourteenth Amendment to the federal Constitution, and that he has no adequate remedy at law by which to preserve his right.

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[1]The operative portion of article I, section 26, of the California Constitution provides:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

Defendant demurred to the complaint upon the ground that it failed to state sufficient facts to constitute a cause of action. Arguments on the demurrer were heard together with arguments on plaintiff's motion for a preliminary injunction and the merits of the constitutionality of article I, section 26. The demurrer was sustained without leave to amend, and thereafter the instant judgment was entered.

We have concluded in *Mulkey v. Reitman,* [a]*ante,* p. .... [50 Cal.Rptr. 881, ... P.2d ....], that article I, section 26, is an unconstitutional infringement upon the equal protection clause of the Fourteenth Amendment, and for that reason defendant is not entitled to rely upon it as giving him a right to discriminate against plaintiff in the rental of defendant's property. It does not follow from such holding, however, that plaintiff stated a cause of action. To withstand defendant's demurrer he must allege facts which entitle him to relief as a matter of law. This he has failed to do.

The facts which plaintiff has alleged show only that defendant has discriminated and intends to further discriminate against defendant and Negroes generally in the rental of defendant's residential property. The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here. (*Mulkey v. Reitman,* [b]*ante,* pp. ...., ... [50 Cal.Rptr. 881, ... P.2d ....].)

[2] Although the state, by action of the Legislature or the People, may make such private acts of discrim-

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[a]Advance Report Citation: *Ante,* p. 557.

[b]Advance Report Citation: *Ante,* pp. 557, 564.

ination unlawful, it has not done so. [3] Section 51 of the Civil Code, commonly known as the Unruh Civil Rights Act, prohibits discrimination only where it occurs in "business establishments of every kind whatsoever." (See *Lee v. O'Hara* (1962) 57 Cal.2d 476 [20 Cal.Rptr. 617, 370 P.2d 321]; *Burks v. Poppy Constr. Co.* (1962) 57 Cal.2d 463 [20 Cal.Rptr. 609, 370 P.2d 313].) [4] The Rumford Fair Housing Act (Health & Safety Code, §§ 35700-35744) prohibits discrimination only in the sale or rental of public assisted housing accommodations and in any private dwelling containing more than four units. (Health & Saf. Code, §§ 35710, 35720.) Plaintiff has failed to allege facts which would bring him within either the Unruh or Rumford acts, or any other statutory provision. Not only has he failed to state a cause of action, but there is nothing in the record to suggest that he could amend his complaint to so state a cause of action under any statutory provision.

Plaintiff is further unable to plead facts which would afford him relief under any decisional law. His reliance in this connection upon *Abstract Investment Co. v. Hutchinson*, 204 Cal.App.2d 242 [22 Cal.Rptr. 309], is misplaced. In that case it was held that to make available to a discriminating landlord the aid and processes of a court in effecting a discrimination would involve the state in action prohibited by the Fourteenth Amendment.

For the foregoing reasons the judgment is affirmed.

Traynor, *C. J.*, Peters, *J.*, Trobriner, *J.*, and Burke, *J.*, concurred.

WHITE, *J.**—For the reasons stated in my dissenting opinion in *Mulkey v. Reitman*, [c]*ante*, p. .... [50 Cal. Rptr. 881, ... P.2d ....], I concur in the judgment.

McComb, *J.*, concurred.

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[c]Advance Report Citation: *Ante*, p. 557.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Constitutional Provision and Statutes Involved.

The only constitutional or statutory provision directly involved here, or upon the validity or application of which the court below passed, is section 26 of Article I of the Constitution of the State of California, added in 1964 as the result of the vote of the California electorate.[1] The other provisions to which petitioners refer [see, *e.g.*, Pet. 3[2]] are only incidentally involved as showing the nature and extent of the operation and effect of section 26.

[1]For convenience this provision is hereinafter referred to merely as *"section 26."* The official edition in which it is found is California Statutes, 1965, vol. 1, p. A-15.

[2]The following abbreviations are used in this Brief:
Pet.:—Petition for a Writ of Certiorari herein.
App.:—Appendix to Petition for a Writ of Certiorari.
Clk. Tr.:—Clerk's Transcript on Appeal in *Mulkey* below.

For an understanding of the abridging effects of section 26 upon the constitutional rights of respondents and those similarly situated, more is needed than the bare bones of the language of the section. The contemporary context in which and the purpose for which section 26 was adopted bring those effects into readily graspable prominence. We supply the needed data in that regard. (See pp. 4-7, *infra.*]

Restatement of the Questions Presented.

1. For the expressly avowed purpose of permitting and enabling persons to discriminate on racial or religious grounds in the sale, rental or leasing of residential property, an amendment to the State's constitution prohibits the State and all of its subdivisions and agencies from limiting, abridging or denying the right of a person to refuse to sell, rent or lease that kind of property to such person as he in his absolute discretion chooses. Does this amendment so involve the State in the racial discrimination that ensues and which is sought to be justified by reliance upon it, as to be, in relation to those discriminated against, a denial by the State of equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States?[3]

The highest court of the State held that there was such a denial. [*Mulkey v. Reitman,* 64 Cal. 2d ...., 64 Adv. Cal. 557, 50 Cal. Rptr. 881, 413 P. 2d 825; *App.,* 35-57; *Prendergast v. Snyder,* 64 Cal. 2d ...., 64 Adv. Cal. 591, 50 Cal. Rptr. 903, 413 P. 2d 847.]

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[3]The questions numbered 2, 3 and 5 in the petition, p. 4, so far as raised below, are but expansive statements of narrower questions that are subsidiary to and comprised in petitioner's question number 1 [*Pet.,* 3], especially as that question is restated in the footnoted text above. Petitioners' question no. 4 is restated immediately next, p. 3, *infra.*

2. Is it a denial of equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States for a State, acting through its judicial department, to assist and enforce the eviction of tenants of an apartment, validly in possession thereof, when the eviction is sought solely because, as it was later ascertained, the husband of the tenant with whom the rental agreement was made (a white woman) is a negro?

The court below, while noting that decision of this question was unnecessary to its judgment, said that it would be such a denial for the State so to act. [*Prendergast v. Snyder, supra,* 64 Cal. 2d ....., 64 Adv. Cal. 591, 50 Cal. Rptr. 903, 413 P. 2d 847; *App.*, 87-91.]

Supplement to Statement of the Cases.

Petitioners' Statement [*Pet.* 2-3, 4-5] needs supplementation, as we have already intimated, p. 2, *supra*, in respect of the circumstances leading to adoption of section 26.[4]

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[4]Respondents asked the Court below to notice judicially the facts leading to the adoption of section 26, saying in that regard in their Opening Brief, p. 7, that "the measure [section 26] cannot be read or interpreted apart from the conditions that gave rise to it, or from the purpose it was designed to subserve. . . . Common knowledge is a source of judicial knowledge in any case [Cal. cits.]; and especially so when the constitutionality of legislation is at stake. 'The invalidity of a statute may be shown by things which will be judicially noticed.' [Cal. cits.]" The summary of the legislative facts contained in the opinion below [*App.*, 37-41] shows they were so noticed.

In California, political history of the world and matters of common knowledge are among judicially noticeable facts. [*Cal. Code of Civil Procedure*, sec. 1875, subd. 8; *Ventura County Harbor District v. Board of Supervisors*, 211 Cal. 271, 277, 295 Pac. 6, 8; *People v. Torres*, 56 Cal. 2d 864, 866, 17 Cal. Rptr. 496, 497, 366 P. 2d 823, 825.] The power of the State appellate courts to take judicial notice is as extensive as that of the trial

(This footnote is continued on the next page)

The Contemporary Context in Which the Legislation Involved Was Adopted.

For many years California has had a very limited form of Civil Rights statute. [Cal. Stats. 1905, c. 413, p. 553; *Cal. Civil Code,* secs. 51, 52.] By it, all citizens originally were declared to have an equal right to service at places of public accommodation such as inns, hotels, restaurants, theaters and the like; and one denied that right on racial grounds was given a cause of action to recover his damages in an amount not less than $100.00. In 1959 the statute was amended to extend its proscription of discrimination to all business establishments; and the sanction for a violation was made recovery of actual damages and $250.00 in addition. [Cal. Stats. 1959, c. 1866, p. 4424.] In 1961, the statutory declaration of equal rights was made applicable to all persons.[5] [Cal. Stats. 1961, c. 1187, p. 2920.]

Before 1963 there was no statutory prohibition of racial discrimination by the owner of non-publicly assisted residential property in its sale, rental or leasing. Real estate brokers, and those engaged in the business

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courts [*Varcoe v. Lee*, 180 Cal. 338, 343, 181 Pac. 223, 225; *County of Marin v. Duffiey*, 144 Cal. App. 2d 30, 34, 330 P. 2d 721, 723]; and may be exercised even though the trial court failed or refused to do so. [*Rogers v. Cady*, 104 Cal. 288, 290, 38 Pac. 81; *People v. Stralla*, 14 Cal. 2d 617, 620, 96 P. 2d 941, 942; *People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883.] This Court's power of judicial notice is as extensive as that of the court whose judgment it is reviewing. [*Hanley v. Donoghue*, 116 U.S. 1, 6; *Chicago and Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622-623; *Adam v. Saenger*, 303 U.S. 59, 63; *Renaud v. Abbott*, 116 U.S. 277, 285.]

[5]The statute is now known as the Unruh Civil Rights Act. [Cal. Stats. 1959, c. 1866, p. 4424, sec. 1; *Cal. Civil Code*, sec. 51.] It was to recover damages under this Act for a refusal to rent an apartment to them solely because they were negroes that the Mulkeys brought the action, the dismissal of which in the trial court was reversed by the court below. [Clk. Tr. 2-5. *App.*, 35-57.]

of selling real estate, however, were held to be "business establishments" within the meaning of the Unruh Civil Rights Act. [*Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 611-612, 370 P. 2d 313, 315-316; *Lee v. O'Hara*, 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 618, 370 P. 2d 321, 322.] In 1959, racial discrimination in the sale, rental or leasing of "publicly assisted" housing was prohibited.[6] [Cal. Stats. 1959, c. 1681, p. 4074.]

By 1963 a high degree of *de facto* residential segregation along racial lines had developed in California.[7] In that year, efforts to bring about open housing culminated in the adoption of the Rumford Fair Housing Act. [Cal. Stats. 1963, c. 1853, p. 3823; *Cal. Health & Safety Code*, Div. 24, Part 5 (beginning with sec. 35700).] This Act prohibited discriminating in housing accommodations because of "race, color, religion, national

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[6]This statute was superseded and expressly repealed in 1963 by a comprehensive "open housing" statute, *i.e.*, the Rumford Fair Housing Act [Cal. Stats. 1963, c. 1853, p. 3823, sec. 1. See, pp. 5-6, *infra*.]

[7]Among the many sources from which the Court may inform its judicial knowledge of the facts summarized in the succeeding text above are the following, all of which, except the last one listed, were called to the attention of the court below:

U.S. Commission on Civil Rights, Report No. 4 (1961), *passim*.

Los Angeles County Commission on Human Relations. Population Housing in Los Angeles County (1963) pp. 2-4.

Jackson v. Pasadena School Dist., 59 Cal. 2d 876, 878-879, 31 Cal. Rptr. 606, 608, 382 P. 2d 878, 880.

University of California Extension Div., Race and Property (Diablo Press, 1964, Denton ed.) pp. 6-8.

Kaplan, Discrimination In California Housing, 50 Cal. Law Rev. 635, 644.

Cal. Commission For Fair Practices, *In A Nutshell*, The Proposed Fair Housing Law (1961), *passim*.

Selected 1963 Legislation, 38 Journal of the State Bar of California 719-720.

origin or ancestry" and declared such discrimination to be against the public policy of the State. [Cal. Stats. 1963, c. 1853, pp. 3823, 3824, sec. 2; *Cal. Health & Safety Code*; secs. 35700, 35720.] It also set up a comprehensive system of enforcing that prohibition. The system included provisions for investigation and mediation of complaints of discrimination, as well as for prevention or compelled cessation of it.[8] [Cal. Stats. 1963, c. 1853, p. 3825; *Cal. Health & Safety Code*, Div. 24, Part 5, Ch. 4, beginning with sec. 35730.]

Adoption of the Act was vigorously opposed by such real estate and property owners' organizations as the California Real Estate Association [see note 24, p. 24, *infra*] and the California Apartment Owners Association. Rebuffed as they were in the legislature, these opponents of the Rumford Fair Housing Act quickly commenced qualification of an initiative measure to undo what the legislature had done and to restore and secure freedom to discriminate. The ultimate result was the addition of section 26 to the State constitution.

As is required by California law [*Cal. Elections Code*, Div. 4, chap. 1, article 3 (beginning with section 3555)] submission of the measure to the electorate was accompanied by "official" arguments pro and con, a copy of which went to every registered voter in the State.[9]

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[8]A mere fragment of this comprehensive statute is printed by petitioners, see *App.*, 11.

[9]These "ballot arguments" are, in California, an accepted aid to ascertainment of legislative intention and purpose. [*People v. Ottey*, 5 Cal. 2d 714, 723-724, 56 P. 2d 193, 197-198; *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 515, 11 P. 2d 857, 860, quoting and approving the opinion in *Crooks v. People's Fin. etc. Co.*, 111 Cal. App. (Supp.) 769, 775-776, 292 Pac. 1065, 1067; *Crees v. Cal. State Board*, 213 Cal. App. 2d 195, 211, 28 Cal. Rptr. 621, 630-631.]

[See, *App.* 3-8] The argument in favor of the measure laid bare its purpose to permit and enable the carrying on of the practice of racial discrimination in the sale, rental and leasing of residential property. It did so in these words:

> ". . . this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.
>
> "Most owners of such property lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.
>
> * * *
>
> "Your 'Yes' vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another." [*App.*, 4.]

Section 26 as proposed and adopted did not expressly repeal the Rumford Act or any other statutory or constitutional provision. Whatever repealing effect it may have had was but the consequence to be implied from its positive prohibition, as a part of the State constitution, of any denial, limitation or abridgement of the right of any person "to decline to sell lease or rent [his] property to such person or persons as he, in his absolute discretion chooses."[10] That prohibition extends to the State and all of its subdivisions and agencies.

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[10]"Property" is so defined in section 26 as to confine it to residential or family dwelling property. [*App.*, 2.]

Reasons Why These Causes Should Not Be Reviewed by This Court.

Section 26 is not merely a repeal of conflicting anti-discrimination legislation. No more is it only a choice not to regulate certain types of private conduct. [*Pet.*, 9.] It is, rather, a complete disenablement of all California government, state-wide or local, from hitting directly at racial discrimination in the sale, rental or leasing of residential property. It erects freedom to discriminate into an impregnable right, secured by the State constitution and put beyond the regulation or control of government. As a consequence of the secure and untouchable position it thus gives to the right to discriminate, the section puts the State in the position of affirmatively authorizing and sanctioning, and of aiding and encouraging, indeed inviting, private persons to discriminate on racial grounds in the sale, rental or leasing of residential property. It was purposefully designed to bring about just that result. [See, pp. 6-7, *supra*, and pp. 12 (fn. 13), 15 (fn. 16), *infra*.] Thus, it involves the State in the intended and authorized discrimination which ensues and which, in the instant cases is, sought to be defended by the invocation of section 26. Viewed in that light, invalidation of section 26 under the Equal Protection Clause on the ground of its involvement of the State in racial discrimination is seen not to give rise to the numerous problems, or to be potentially productive of the consequences, to which petitioners direct their fears and forebodings. [See, *e.g.*, *Pet.*, 8-11, 13-14, 21-23. But see, pp. 10-23, *infra*.]

Furthermore, because of the section's breadth of reach, the stringency of its proscription, and the candidly confessd pro-discrimination nature of its purpose,

it is unique—unique to California, without near or similar counterpart anywhere else. The State court's decision holding the section obnoxious to the Equal Protection Clause does not, therefore, have any extra-territorial influence or national significance. By the same token, the federal interest in not having the guarantees of the Constitution of the United States ignored or flouted has been fully vindicated by the State court's declaration of unconstitutionality. In short, the questions presented have no real existence; the decision, because of the uniqueness of the operative facts, is of limited significance outside of California; and no violence has been done to the national constitution. So, there are not to be found in the instant record the conventional or required bases of certiorari jurisdiction. [Supreme Court of the United States, *Revised Rules*, rule 19, subd. 1(a). See, also, cases cited pp. 15, 17, *infra*.]

It, of course, adds nothing to the case that the unconstitutional provision is one adopted by the people acting directly, rather than by their elected representatives. [See, *Pet.* 2, 9-10.] The people's action was just as much the action of the State as a formal enactment adopted by the legislature would have been. The limitations of the national constitution bind the State in all of its manifold activities. Those limitations cannot be exceeded, whatever may be the means or agency by which the State seeks to act.[11] [*Lucas v. Forty-Fourth General*

[11]Every amendment to the State constitution must be adopted by popular vote [*Cal. Const.*, art. IV, sec. 1, and art. XVIII], as is no doubt true in many other states. If the people acting in such a legislative capacity are not bound by the limitations upon state action imposed by the Constitution of the United States, there has long been a heretofore unnoticed means of es-

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Assembly of Colorado, 377 U.S. 713, 736-737; *McCulloch v. Maryland*, 4 Wheat. 316, 405-406.]

1. The Court Below Did Not Decide That Anti-Discrimination Legislation Once Adopted Could Not Be Repealed.

The difficult problems that petitioners profess to see arising because of the decision below [see, *Pet.* 9-11] stem from the unjustified assumption that what was held was that a State, having once adopted a policy against racial discrimination by private persons, may not abandon or change it; in other words, that what was held was that it is a denial of equal protection to repeal statutes that prohibit racial discrimination. That is a pretty distorted, in fact a wholly false, view of what was done.

The cases here, as presented and decided below, did not involve repeal alone. At most, repeal came in only as a collateral or implied incident of the substantive provision that made freedom to discriminate a secured and inviolable right under the State constitution. [See, p. 7, *supra*.] This substantive provision was held unconstitutional, because it involved the State in racial discrimination. Consequently, the question whether section 26 could be given effect as a repeal of the existing and inconsistent legislation prohibiting racial discrimination, depended on whether the implied or incidental

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cape from limitations of the Constitution that on occasion other States have resisted or sought to evade.

Other amendments to the constitution of California have been held invalid. [See, *e.g.*, *Speiser v. Randall*, 357 U.S. 513; *First Unitarian Church v. Los Angeles*, 357 U.S. 545.]

repealing effect of the section could be severed from its substantive provision. The State court held it could not, on grounds that are completely supportable. [See, *App.*, 54-56.] The decision in that respect is beyond review by this Court; for severability is a question of State law, upon which this Court is bound by the State court's decision. [*Morey v. Doud*, 354 U.S. 457, 470; *Dorchy v. Kansas*, 264 U.S. 286, 290; *Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562.]

So far as repeal is concerned, the upshot of the decision is not that repeal of the existing policy against racial discrimination was objectionable on constitutional grounds, but only that as an implied repeal the section was ineffective. It was ineffective, because its repealing effect was inseparable from, indeed, was only an incident of the substantive provision which, in turn, was invalid on other grounds. It followed that this incidental effect, even though otherwise valid, fell with the collapse of the invalid part.[12]

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[12]The rule is settled in California that where a provision includes both valid and invalid restrictions "and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, the provision is void in its entirety . . ." [*Fort v. Civil Service Com.*, 61 Cal. 2d 331, 339, 38 Cal. Rptr. 625, 630, 392 P. 2d 385, 390; *In re Portnoy*, 21 Cal. 2d 237, 242, 131 P. 2d 1, 3; *Wills v. Austin*, 53 Cal. 152, 178-179.] So, when the invalid part is so blended with the rest that "the defect cannot be cured by excising any word or group of words" the valid part also falls. [*In re Blaney*, 30 Cal. 2d 643, 655-656, 184 P. 2d 892, 900.] That is the case with section 26. Its repealing effect depends on the implication to be drawn from the inconsistency between the substantive part of section 26 (which was the part held invalid) and the legislation said to be repealed. Its effect as a repeal, *ex hypothesi* valid by itself, is inextricably blended with the invalid part of the section and, therefore, takes on that invalidity. The court below, as a matter of state law, expressly so held. [*App.*, 54-56.]

Thus, we see, that the court below did not hold that the Equal Protection Clause forbade giving effect to section 26 as a repeal of the Rumford Fair Housing Act and the Unruh Civil Rights Act. The section's effect as a repeal was invalidated upon a different ground, and a state ground at that.[13]

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[13]So far as section 26 is a repeal of existing anti-discrimination legislation, it was intentionally and purposefully made so in order to clear the way for private discrimination in the housing field. [See, pp. 6-8, *supra*.] In that operation, it is subject to the rationale employed by this Court in *Terry v. Adams*, 345 U.S. 461, 465-466 in approving the decisions of the Court of Appeals in *Rice v. Elmore*, 4 Cir., 165 F. 2d 387, *cert. den.* 333 U.S. 875 and *Baskin v. Brown*, 4 Cir., 174 F. 2d 391; and in reversing a state court judgment in *Evans v. Newton*, 382 U.S. 296.

In the *Rice* and *Baskin* cases, South Carolina, for the purpose of avoiding constitutional restrictions that prevented the State from barring negroes from voting in the Democratic Party primary, repealed, as this Court said, "every trace of statutory or constitutional control of the Democratic primaries . . ." [*Terry v. Adams*, *supra*, 345 U.S. at 465-466.] As was readily foreseeable, the Party as a private organization, holding its own internal election, accomplished the sought-for exclusion. Thus, the exclusion of negroes from those primaries was entirely private action, not commanded, controlled, regulated or aided by the State. The court, however, looked through the form of the words of mere repeal to the substance of the realistic statutory purpose and held that it was the State that had acted to exclude.

In *Evans*, the state court by means of an ordinary and on its face wholly innocuous judgment, accepted the resignation of a city as trustee of private trust property dedicated to park uses, and appointed private persons as substitute trustees. The readily inferrable though unexpressed purpose, however, was to enable the park to be operated, as the city could not constitutionally operate it, to the exclusion of negroes. Once again looking through the harmless form of words to the discriminatory purpose, the court held that by the judgment the State had acted unconstitutionally.

The same vitiating purpose is found in section 26. [See, pp. 6-8, *supra*.] While seemingly sympathetic to the rationale adumbrated in this note [see, *App.*, 47-49], the court below did not put its decision upon that ground. There is, therefore, no question in that respect to be reviewed. [See, *Black v. Cutter Laboratories*, 351 U.S. 292, 297. *Cf.*, *Morrison v. Watson*, 154 U.S. 111, 115.]

2. The Principle That a State May Be Involved in Private Discriminatory Conduct by Acts Falling Short of Compulsion Is Well Established. The Question of Involvement at Bar Is Not of Certiorari Quality but Only One of Appreciation of the Facts Showing Such Involvement.

There is, of course, nothing new in the proposition that there may be "state action" within the meaning of the Fourteenth Amendment even when there has been no formal exercise of a governmental power or any official act of the governmental establishment.[14] Private action of a sort that, if officially or formally done by the State would come within the proscription of that Amendment, still comes within it if it is conduct for which the State may be said to be fairly responsible. [See, *Terry v. Adams, supra,* 345 U.S. at 473, Frankfurter, *J.*, concurring.] Governmental sanction of private conduct, it is settled, "need not reach the level of complusion to clothe what is otherwise private discrimination with 'state action.'" [*Simkins v. Cone Memorial Hospital,* 4 Cir. (*en banc*), 323 F. 2d 959, 968, *cert. den.* 376 U.S. 938.] There is no closed category of acts or conduct that will so involve the State in private racial discrimination as to make the Fourteenth Amendment

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[14]If such formal or official action is needed, we have it in the instant case. Section 26 is a formal and official legislative act of the State of California, effected strictly in accordance with the mode prescribed by its organic law. [Cal. Const., art. IV, sec. 1, and art. XVIII.] To bring that "state action" within the proscription of the Fourteenth Amendment it is only necessary that it should have had the effect of denying some person equal protection of the laws or of taking his property or liberty without due process of law. When such a denial or taking is effected by private action the question is whether the State is fairly responsible for or significantly involved in the private action. [See, pp. 13-14, *infra.*]

applicable.[15] [*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 725-726.]

In any given case, therefore, the question whether the State is involved by acts that fall short of official compulsion, is not one of law or constitutional principle.

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[15]Among the many kinds of conduct that have been held to amount to State involvement are: Exhortations by city officers not to protest racial segregation [*Lombard v. Louisiana*, 373 U.S. 267, 269-270]; the inciting effect, in view of known private attitudes, of requiring the race of candidates to be printed on election ballots [*Anderson v. Martin*, 375 U.S. 399]; the interplay of private and state acts bringing about subjection of negroes to private reprisal as the consequence of State-compelled disclosure of their membership in a locally unpopular organization [*N.A.A.C.P. v. Alabama*, 375 U.S. 449, 463]; leasing premises upon which private discrimination takes place, though the discrimination is not commanded or suggested by the State [*Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, *reversing* 6 Cir., 202 F. 2d 275; *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715; *Derrington v. Plummer*, 5 Cir., 240 F. 2d 922, 925-926]; encouraging use of racially discriminatory deed covenants, by allowing damages for breach [*Barrows v. Jackson*, 346 U.S. 249, 254]; administering a discriminatory private trust [*Pennsylvania v. Board of Directors*, 353 U.S. 230]; substituting private persons for a city as trustee of a private trust in order to permit discriminatory operation of trust property [*Evans v. Newton*, *supra*, 382 U.S. 296]; financial assistance to businesses or establishments in which discrimination is carried on [*Simkins v. Cone Memorial Hospital*, *supra*, 323 F. 2d at 965-968]; permitting private regulation of primary elections, without any governmental control or suggestion, but for the implicit purpose of excluding negroes [*Terry v. Adams*, *supra*, 345 U.S. at 465-466, approving *Baskin v. Brown*, *supra*, 174 F. 2d 391, and *Rice v. Elmore*, *supra*, 165 F. 2d 387]; permitting or tolerating discrimination under authority but not the compulsion of state law [*McCabe v. Atchison, etc. Ry. Co.*, 235 U.S. 151, 161-162; and *cf.*, *Public Utilities Com. v. Pollak*, 343 U.S. 451, and *Marsh v. Alabama*, 326 U.S. 501]; permitting *de facto* school segregation caused by neighborhood private residential patterns [*Jackson v. Pasadena School Dist.*, *supra*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878; *Branche v. Board of Education*, E.D.N.Y., 204 F. Supp. 150]; encouraging discrimination by burdening integrated operation of places of public accommodation. [*Robinson v. Florida*, 380 U.S. 153, 156-157.]

The principle has been established. [Cases cited, pp. 13-14, *supra.*] The question is one of fact. There were at bar ample factual indicia of State involvement.[16] Given the settled principle of law to which we have referred, the question here is only whether the court below correctly appreciated those facts in arriving at its conclusion that the State was involved. That is not the kind of a question for the review of which this Court's certiorari jurisdiction is ordinarily exercised. [See, *Houston Oil Co. v. Goodrich,* 245 U.S. 440; *General Talking Pic. Corp. v. Western Elec. Co.,* 304 U.S. 175, 178.] ". . . [W]here conclusions of [the court below] depend on appreciation of circumstances which admit of different interpretations . . ." the "usual rule is [one] of noninterference . . ." [*N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 503.]

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[16]The purpose of the enactment was to permit racial discrimination. That such discrimination would take place was a readily foreseeable event. The enactment went beyond passive acquiescence in the discrimination, but effectively and affirmatively secured it against any governmental sanctions or penalties and made it mandatory for the State to permit it. In these ways the State authorized and sanctioned, and, indeed invited and encouraged, private discrimination. Further, as a consequence of private discrimination, *de facto* zoning or districting of residential areas along racial lines was and is brought about and maintained. By permitting that to be done, the important governmental function of zoning is left in private hands and permitted to be discriminatorily exercised [see, St. Antoine *Color Blindness But Not Myopia,* 59 Mich. Law Rev. 993, 999-1001], whereas such an exercise of it directly by the government undoubtedly would be a denial of Fourteenth Amendment rights. [*Buchanan v. Warley,* 245 U.S. 60; *Harmon v. Tyler,* 273 U.S. 668, reversing, *per curiam, Tyler v. Harmon,* 158 La. 439, 104 So. 200, 160 La. 943, 107 So. 704; *Birmingham v. Monk,* 5 Cir., 185 F. 2d 859, 862, *cert. den.* 341 U.S. 940; *Richmond v. Deans,* 4 Cir., 37 F. 2d 712, *affirmed* 281 U.S. 704.]

3. Because of the Exceptional and Unique Character of the California Legislation, the Constitutional Problem Involved in the Instant Cases Is Not of General Public Importance.

Petitioners have presented an elaborate "Survey of State and Municipal Laws Regulating Racial Discrimination in Housing." [*App.*, 15-34.] It shows that the instant case is unique to California. Nothing like the California statutory posture is to be found elsewhere; and even in California it is confined to section 26—the only variant, since earliest days of statehood, from the State's consistent pattern of treating racial discrimination as against public policy.[17] The instant decisions effectively dispose of that variant.

No doubt, as petitioners say, a substantial number of states and cities have statutes regulating or prohibiting private racial discrimination in housing [*App.*, 16, 25] —statutes that are undoubtedly constitutional. [*Massachusetts Com. Against Discrimination v. Colangelo*,

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[17]Racial discrimination has been declared to be contrary to the State's public policy in, for example, availability of the services and facilities of business establishments [*Cal. Civil Code*, sec. 51]; in community redevelopment or urban renewal projects [*Cal. Health & Safety Code*, secs. 33050, 33435]; in housing [*ibid.*, sec. 35700]; in use of public beaches [*Cal. Gov. Code*, secs. 54091, 54092]; and in employment. [*Cal. Labor Code*, secs. 1411, 1412.] A fuller compilation is found in *App.*, 12-14.

Because of that policy, and the same general policy prescribed for the Nation by the Fourteenth Amendment, California's courts have worked out a remedy for refusal, on the ground of their race, to admit negroes to membership in labor unions [*James v. Marinship Corp.*, 25 Cal. 2d 751, 155 P. 2d 329; *Williams v. International Brotherhood*, 27 Cal. 2d 586, 165 P. 2d 903]; declared *de facto* school segregation unconstitutional and remediable [*Jackson v. Pasadena School Dist.*, *supra*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878]; and invalidated restrictions on ownership of land by Japanese. [*Sei Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617.]

344 Mass. 387, 18 N.E. 2d 595; *Colorado Anti-Discrimination Com. v. Case*, 151 Colo. 235, 380 P. 2d 34. See, *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94; *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109; *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 41 Douglas, *J.*, concurring.] But, there is not a single state or other governmental entity that has disenabled itself, as California did in section 26, from adopting such statutes or ordinances, *i.e.*, from ever prohibiting or directly regulating private racial discrimination in housing; and that has also withdrawn existing prohibition of racial discriminetion in order that it may be resumed and carried on under the State's protection. Petitioners refer to no statute or ordinance comparable to section 26, and we know of none. Nowhere else, therefore, are there now or are there likely to be the problems of law and fact that section 26 brought about in California.

We do not deny, we need not deny, that in respect of those problems the instant decisions were of important significance to the economy and general welfare of the State of California. Because of the uniqueness of their factual bases, however, the decisions are without precedential or persuasive influence elsewhere. They are far from being national in scope or incidence. For these reasons, they are not of the kind to which the time and energies of this Court ought to be devoted. [See, *Layne and Bowler Corp. v. Western Well Wks.*, 261 U.S. 387, 393; *Rice v. Sioux City Cemetery*, 349 U.S. 70, 77-79.]

4. No Question Involving the Application of Shelley v. Kraemer, 334 U.S. 1, Was Decided by the Court Below. Decision Was Expressly Put on Other Grounds.

A substantial part of petitioners' reasons for urging that the writ of certiorari be granted, has to do with the supposedly erroneous interpretation of *Shelley v. Kraemer*, 334 U.S. 1, made below. [*Pet.* 17-25.] The argument is more hypothetical than real. It seems to be based on the reference in the opinion in the *Prendergast* case [*App.* 89-90] to *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309. That was an earlier decision of a California intermediate appellate court, in which reliance had been put on *Shelley*. But, in *Prendergast* the State Supreme Court, referring to *Abstract*, expressly said that it was "not required to rely upon that case in affirming the judgment herein . . ." [*App.*, 90.] So saying, it affirmed on the ground that it had held in *Mulkey* that "section 26, upon which defendant [petitioner] relies for the declaration of rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment . . ."[18] [*App.* 90.]

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[18]In *Hill v. Miller*, 64 Cal. 2d ....., 64 Adv. Cal. 819, 50 Cal. Rptr. 908, 413 P. 2d 852, decided the same day, there was a similar reference to *Abstract*. [*App.* 94.] That decision is not here for review. The party against whom judgment went (plaintiff Clifton Hill) is not one of the petitioners [see *Pet.* 1 (note 1)]; nor is he otherwise here.

There was more discussion of *Shelley* in the memorandum opinion filed by the trial judge in *Prendergast*. [*App.* 79-87.] That opinion was, of course, superseded by the affirming opinion of the Supreme Court. [See, *Worthley v. Worthley*, 44 Cal. 2d 465, 472, 283 P. 2d 19, 24.] Being the opinion of a court of first instance, it is merged in the findings and judgment [*De Cou v. Howell*, 190 Cal. 741, 751, 214 Pac. 444, 448], and anyway, even in the State of its rendition, has no precedential value. [*Cf., Auto Equity Sales Inc. v. Superior Court*, 57 Cal. 2d 450, 455-456, 20 Cal. Rptr. 321, 323-324, 369 P. 2d 937, 939-940; *People v.*

Mulkey was no more based on any *Shelley* ground than was *Prendergast.*[19] Indeed, after noting and correctly stating the proposition for which *Shelley* stands [see, note 19, p. 19, *supra*], and the distinction of it sought to be made by petitioners [*App.* 46], the court below moved on to the real basis of its decision—that the prohibition of the Fourteenth Amendment "extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests . . ."[20] [*App.* 47-54.]

Thus, it appears that the court's discussion of *Shelley* was unnecessary to the result reached. "This

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Cowles, 142 Cal. App. 2d Supp. 865, 867; 298 P. 2d 732, 734; *Mueller v. Brown*, 221 Cal. App. 2d 319, 328, 34 Cal. Rptr. 474, 479; *Wheeler v. Kraner*, 21 Cal. App. 2d 460, 463, 69 P. 2d 881, 883.]

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[19]Reference was made to *Shelley* in the *Mulkey* opinion to show that in finding state action the court was "not limited to action by one who, cloaked with the authority of the state, acts as its designated representative . . ."; but that it could find such action "where the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purpose . . ." [*App.* 45.] The proposition for which *Shelley* stands, the court said, is that "when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved . . ." [*App.* 46.]

[20]That proposition, the court believed, was broader than and transcended *Shelley*. [*App.* 47.] It was derived [*App.* 47-52] from a synthesis of the results reached by and the discussion of this Court in *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715; *Evans v. Newton*, *supra*, 382 U.S. 296; the company town case [*Marsh v. Alabama*, 326 U.S. 501]; the "white primary" cases [*Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, *supra*, 345 U.S. 461; *Nixon v. Condon*, 286 U.S. 73; *Baskin v. Brown*, *supra*, 174 F. 2d 391; *Rice v. Elmore*, *supra*, 165 F. 2d 387]; the "sit-in" cases [*Robinson v. Florida*, 378 U.S. 153; *Bell v. Maryland*, 378 U.S. 22]; and the "encouragement of discrimination" cases [*Anderson v. Martin*, *supra*, 375 U.S. 399; *Barrows v. Jackson*, 346 U.S. 249.]

court," it has said, "reviews judgments, not statements in opinions . . ." [*Black v. Cutter Laboratories, supra,* 351 U.S. at 297.] To furnish the basis of certiorari jurisdiction, it is not enough that a question was raised or even that it was discussed by the court below; it must have been *necessarily* decided. [*De Saussure v. Gaillard,* 127 U.S. 216, 232; *Lynch v. New York,* 293 U.S. 52, 54; *Honeyman v. Hanan,* 300 U.S. 14, 18.] That was not done with the *Shelley* question to which petitioners devote so much of their attention.[21]

5. The Court Below Did Not Hold That the Fourteenth Amendment Imposes Upon the States a Duty to Provide a Remedy for Racial Discrimination. There Is, Therefore, No Conflict With Decisions Elsewhere Supposedly Holding There Is No Such Duty.

The conflict seen by petitioners between the instant decisions and those "of the Highest Courts in Other States . . . and with Certain Lower Federal Courts . . ." [*Pet.,* 25-26] is a non-existent one. It is created by petitioners' ascription to the court below of a decision it did not make. That court did not hold "that the failure of California to provide a remedy which it once

[21]The "psychiatric overtones" with which petitioners fear the courts may be overwhelmed [see, *Pet.* 21] are not the product of the instant decisions. If they exist at all which we seriously doubt, they are the product of this Court's original determination in *Shelley.* In the eighteen years that *Shelley* has been on the books, during which time the problems of racial discrimination have been uppermost in the country's consciousness, there has been no noticeable surge of cases seeking to bring "every dispute between members of different racial, religious or political groups" [*Pet.,* 21] within the ambit of the *Shelley* rationale. Indeed, petitioners here argued in the court below [see *Petition for Rehearing,* pp. 15-16] and they may not deny the assertion here, that *Shelley* has been rarely resorted to; and, "despite numerous ideal opportunities to dispose of controversies on [the California Supreme] Court's version of *Shelley,* the United States Supreme Court has refused to do so . . ."

provided against racial discrimination by the owners of private residential property violates the equal protection clause . . ."[22] [*Pet.*, 25.] What it did hold was that by disenabling itself from ever providing such a remedy, securing and protecting racial discrimination against governmental regulation or sanction, and purposefully permitting it to be carried on, the State had so involved itself in the ensuing and readily anticipatable private discrimination as to violate the equal protection clause. [*App.*, 43-54.]

It may be, as petitioners argue, although the cases they cite do not support their argument—it is unnecessary at the moment to consider the argument—that "the Fourteenth Amendment does not of its own force impose a duty upon the state to provide— or maintain —remedies against . . . discriminatory private conduct . . ." [*Pet.*, 25.] The court below held nothing to the contrary, even though, as we have noted [see note 22, p. 21, *supra*], an argument in favor of the imposition of such a duty was made by us. In point of fact, in the companion case of *Hill v. Miller*, 64 Cal. 2d ....., 64 Adv. Cal. 819, 821, 51 Cal. Rptr. 689, 690, 415 P. 2d 33, 34 (on rehearing), the court expressly relying on *Mulkey*, said: ". . . The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here . . ." [*App.* 93.]

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[22]We argued below, citing *Truax v. Corrigan*, 257 U.S. 312, that section 26 violated the Due Process Clause of the Fourteenth Amendment. This it did by withdrawing the State completely from the field of controlling racial discrimination, and prohibiting any state remedy for the irreparable injury caused by that discrimination. The court below, however, did not adopt that argument as a ground of decision. [See, *App.*, 44-45, 93.]

Once again, petitioners are asking this Court to review a question that is not here. The particular decision or holding they seek to have reviewed was not made. So, there is no reason why the attention of this Court should be devoted to any question in that regard. [See, cases cited, p. 15, *supra.*]

6. As Construed Below, Section 26 Was Not Merely a Choice to Leave Certain Evils Unregulated. It Was, Rather, an Affirmative Aid to and Encouragement of Discrimination. The Question of the Constitutionality of a Partial Choice Was Not, Therefore, Involved or Decided.

It may indeed be so that a state need not always "attack all evils in the same field simultaneously." [*Pet.* 24.] Nothing in the decisions here involved suggests or even intimates any deviation from that principle by the court below. Petitioners' point in this connection is irrelevant, for it rests on the question-begging assumption that all that section 26 did was to make a simple choice to leave certain evils in the field of racial discrimination unregulated. [See, *Pet.* 9.] Section 26, in fact, does very much more than that [see, pp. 6-8, 12 (fn 13), 15 (fn. 16) *supra*], as the court below fully recognized. It construed the section as in effect securing a right to discriminate and thus to be such an aid to or encouragement of the discrimination as to involve the State in it. [*App.*, 43, 52.] That construction of the meaning and scope of the local legislation is, of course, binding on this Court. [*Garner v. Louisiana*, 368 U.S. 157, 166; *De Saussure v. Gaillard, supra*, 127 U.S. at 232-233.]

Accepting the State court's construction, as we must, it is apparent that there was no basis for any question of the constitutionality of a partial choice and, conse-

quently, no need to make any decision in respect of it. Neither expressly nor impliedly did the court below make the ruling to which petitioners object. Here, as with other parts of their argument, they reach for a question not fairly presented by the instant record.

7. Only a Part of the Proceedings That Led to the Decisions Sought to Be Reviewed Has Been Brought Here. Consequently, a Complete Review or Disposition of Those Decisions Cannot Be Made.

First: The cases here sought to be reviewed are but two of seven cases decided together and upon the same grounds.[23] The judgments in the other cases are now final. [*Cal. Rules of Court,* sec. 24(a), West's Annotated California Codes, vol. 23, pt. I, p. 305.] Nothing that may be done in response to the petition now before this Court can affect the judgments in those other five cases. It would be anomalous, if not in fact a discrimination against the respondents here, to order review of only a part of what for all practical purposes was one case or proceeding. [See, note 24, p. 24, *infra.*]

Review and final decision conformably to petitioners' views would produce the paradoxical result of diametrically opposed judgments as against parties similarly situated. That dichotomous situation, should it occur, would not have been the consequence of a reasoned dis-

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[23]In addition to *Mulkey* and *Prendergast*, in respect of which the instant petition was filed, there were the following: *Peyton v. Barrington Plaza*, 64 Cal. 2d ....., 64 Adv. Cal. 594, 50 Cal. Rptr. 905, 413 P. 2d 849; *Hill v. Miller*, 64 Cal. 2d ....., 64 Adv. Cal. 598; 50 Cal. Rptr. 908, 413 P. 2d 852, on rehearing, 64 Cal. 2d ....., 64 Adv. Cal. 819, 51 Cal. Rptr. 689, 415 P. 2d 33; *Thomas v. Goulias*, 64 Cal. 2d ....., 64 Adv. Cal. 601, 50 Cal. Rptr. 910, 413 P. 2d 854; *Grogan v. Meyer*, 64 Cal. 2d ....., 64 Adv. Cal. 589, 50 Cal. Rptr. 901, 413 P. 2d 845; *Redevelopment Agency v. Buckman*, 64 Cal. 2d ....., 64 Adv. Cal. 603, 50 Cal. Rptr. 912, 413 P. 2d 856.

tinction between the parties. Rather, it would have been brought about by the fortuitous, perhaps even whimsical or arbitrary, choice of which of the parties should seek, and the cases in which they should seek the writ of certiorari.[24] The parties should not be subjected to the risk of this inconsistent eventuality.

Second: Finality in the appellate sense is, of course, an essential ingredient of this Court's jurisdiction to review a state court judgment. [28 U.S.C., § 1257(3); *Market Street R. Co. v. Railroad Com.*, 324 U.S. 548, 551.] While the judgment in *Prendergast* is final in that sense, the judgment in *Mulkey* is not. The latter judgment reverses the judgment of the trial court. The case, therefore, is one that has never been tried or decided on the merits; the issues of fact in it have never been resolved. The judgment sought to be reviewed did not resolve those issues. Neither did the judgment that was reversed, for that judgment was rendered on the pleadings alone. [*App.*, 36.] The effect of the reversal was to remand the case for trial, leaving the parties as

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[24]The seven cases proceeded in the State Supreme Court as one. The attorneys who appear here for the petitioners appeared there in all seven cases, either as attorneys for the property-owner parties or for the California Real Estate Association, *amicus curiae* in behalf of those parties. [See, 64 Adv. Cal. at 559, 589, 591, 594, 598, 601, 604.] The brief prepared by those attorneys was filed in each of the seven cases. The property-owner parties represented by other attorneys either did not appear at all [see, *e.g.*, 64 Adv. Cal. at 589, 601] or joined in that brief.

The court below could, of course, notice its own records in these cases. [*Flores v. Arroyo*, 56 Cal. 2d 492, 496, 15 Cal. Rptr. 87, 89-90, 364 P. 2d 263, 265-266; *People v. Rojas*, 57 Cal. 2d 676, 679-680, 21 Cal. Rptr. 564, 566, 371 P. 2d 300, 302.] So, therefore, may this Court. [Cases cited, note 4, p. 3, *supra*.] Accordingly, we attach as an appendix to this brief a reproduction of the cover page of the principal brief filed below in opposition to those who were asserting the invalidity of section 26. From it the Court's judicial knowledge of the statements of fact made in this note may be informed.

though there had been no judgment. [*Central Sav. Bank v. Lake,* 201 Cal. 438, 443, 257 Pac. 521, 523.] The requisite finality, therefore, is lacking. [*Southern Pacific Co. v. Gileo,* 351 U.S. 493, 495-496; *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 381-382; *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547.]

Thus, the case in which the main and controlling opinion of the court below was written is not and cannot be properly here. It was that case that raised squarely the question of the applicability of section 26 as a defense to a racially grounded refusal to rent. Without that case and its factual record, the question of the constitutionality of section 26 will be here on only a part of the record upon which the court below acted. Review of a question presented by petitioners as one of overwhelming importance ought not to be had on an incomplete record.

Conclusion.

The petition for a writ of certiorari to the Supreme Court of the State of California should be denied.

Respectfully submitted,

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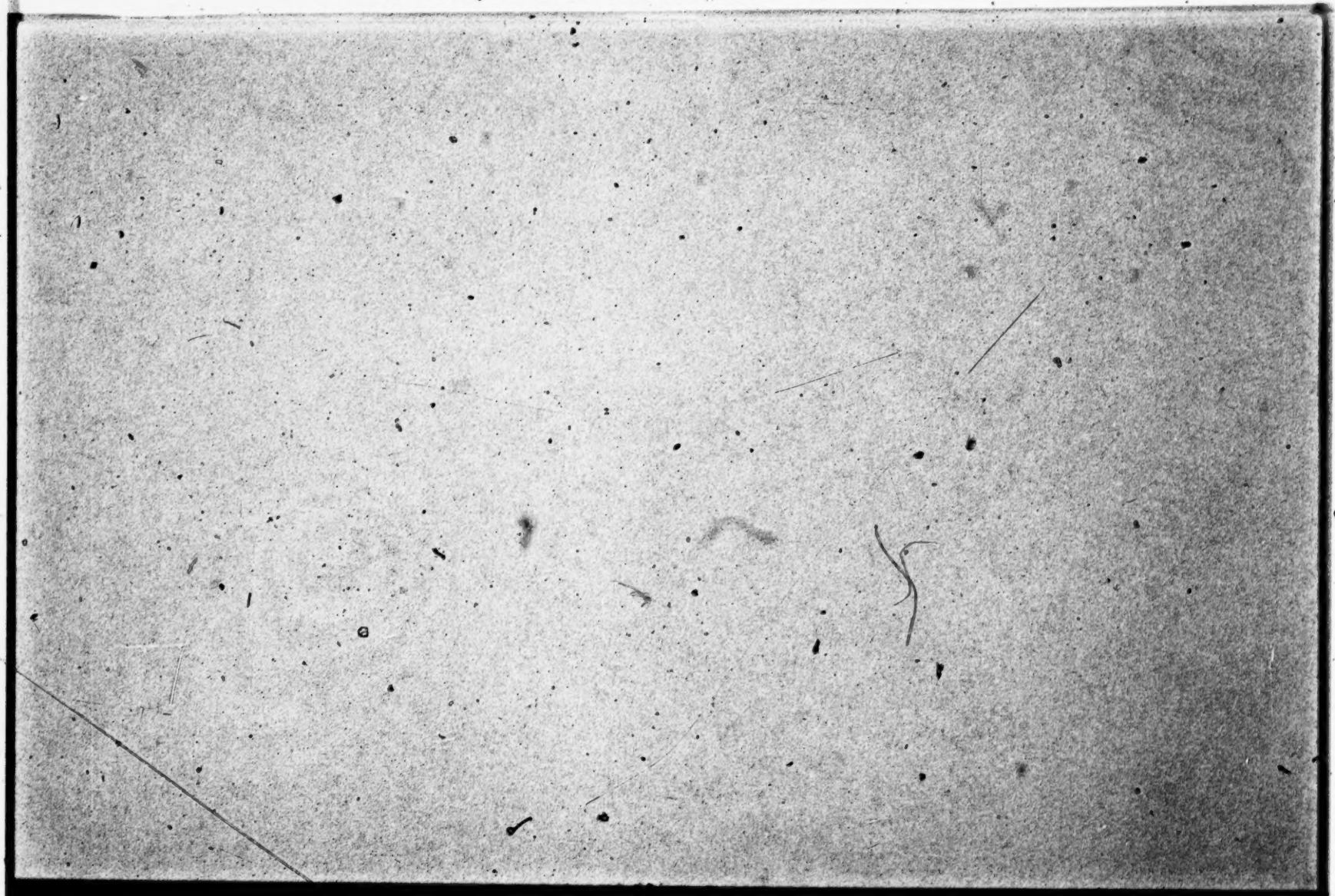

L. A. Nos. 28360, 28422, and 28449

In the Supreme Court of the State of California

L.A. No. 28360

LINCOLN W. MULKEY, *et al.*,

Plaintiffs and Appellants,

vs.

NEIL REITMAN, *et al.*,

Defendants and Respondents.

Appeal From the Superior Court of Orange County
Honorable Raymond Thompson, Judge

BRIEF OF RESPONDENTS

L. A. No. 28422

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated,

Cross-Defendants and Respondents,

vs.

CLARENCE SNYDER,

Cross-Complainant and Appellant.

Appeal From the Superior Court of Los Angeles County
Honorable Martin Katz, Judge

APPELLANT'S OPENING BRIEF

L. A. No. 28449

THOMAS ROY PEYTON, M.D.,

Plaintiff and Appellant,

vs.

BARRINGTON PLAZA CORPORATION,

Defendant and Respondent.

Appeal From the Superior Court of Los Angeles County
Honorable Martin Katz, Judge

BRIEF OF RESPONDENT

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(Continued on Inside Cover.)

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Brief of California Real Estate Association as Amicus Curiae in the Following Cases:

SAC. No. 7657

CLIFTON HILL,

Plaintiff and Appellant,

vs.

CRAWFORD MILLER,

Defendant and Respondent.

Appeal From the Superior Court of Sacramento County
Honorable William Gallagher, Judge

S. F. No. 22019

DORIS R. THOMAS,

Plaintiff and Appellant,

vs.

G. E. GOULIAS, *et al.*,

Defendant and Respondent.

Appeal From the Municipal Court of the City and County of San Francisco
Honorable Robert J. Drewes, Judge; Honorable Leland J. Lazarus, Judge, and Honorable Lawrence S. Mana, Judge

---

S. F. No. 22020

JOYCE GROGAN,

Plaintiff and Appellant,

vs.

ERICH MEYER,

Defendant and Respondent.

Appeal From the Municipal Court of the City and County of San Francisco
Honorable Robert J. Drewes, Judge; Honorable Leland J. Lazarus, Judge, and Honorable Lawrence S. Mana, Judge

---

S. F. No. 22017

REDEVELOPMENT AGENCY OF THE CITY OF FRESNO, a public body, corporate and politic,

Petitioner,

vs.

KARL BUCKMAN, Chairman of the Redevelopment Agency of the City of Fresno,

Respondent.

PETITION FOR WRIT OF MANDATE.

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SUPREME COURT, U. S.
SEP 30 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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IN THE

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Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Pursuant to Rule 24(4), we respectfully submit this short reply to certain of the matters urged in Respondents' Brief in opposition to the Petition for Certiorari filed herein August 25, 1966.

I.

The Questions of Nationwide Importance Presented by the Petition Are Squarely Raised by the Judgments Below and Are Not Obviated by Respondents' Inaccurate Interpretation of the Basis of the Decisions of the Court Below or Their Pejorative Restatement of the Questions.

As we have shown, the questions presented for review are of great importance not only to the millions of people in California but to citizens throughout the na-

tion (Pet. pp. 8-11). Here, a state court, relying solely on the federal constitution, has declared invalid an amendment to a state constitution adopted by an overwhelming popular vote.[1] Such a nullification of the legislative will should be accomplished, if at all, only by the authoritative judgment of this Court, at least in cases such as these where the correctness of the decisions below is extremely doubtful.

Respondents' effort to sweep aside these critical questions is based primarily upon their erroneous contention that the Court below did not decide that repeal of anti-discrimination legislation was forbidden by the equal protection clause. Section 26, they say, "made freedom to discriminate a secured and inviolable right under the State constitution", (Resp. Br. p. 10), that it was "a complete disenablement of all California government . . . from hitting directly at racial discrimination in the sale . . . or leasing of residential property" (Resp. Br. p. 8). They argue that it was this "substantive provision" of Section 26 that was held unconstitutional and not its repealing effects (Resp. Br. pp.

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[1]According to a recent public opinion poll, *72%* of California voters would answer "yes" to this question in mid-September, 1966: "Do you believe that a property owner has the right to discriminate in any way he sees fit as far as the sale or rental of his own property is concerned?" *22%* would answer "no," 6% would answer "don't know." The State Poll, *Los Angeles Times*, September 21, 1966, Part I, p. 3. See the classic dissent of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U.S. 312 at 357:

> "* * * Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread, and has been reached after deliberation. * * *"

7, 10-12). These assertions, to put it bluntly, are not true.

In adopting section 26 as a part of their Constitution, the people of California decided two and only two issues: (1) they repealed legislation inconsistent with its provisions, (2) they reserved to themselves the legislative power under the initiative process to regulate the conduct of the owners of private residential property in declining to sell or lease it for whatever reason or for no reason at all. The Court below did not question the validity of the people's resolution of the second issue (Pet. p. 12, n. 10). That question had been decided favorably to petitioners' position in a prior case, *Higgins v. City of Santa Monica,* 62 Cal. 2d 24, 41 Cal. Rptr. 9, 13. Therefore, the basis of the judgments below must be the California Court's view that the *pro tanto* repeal of preexisting legislation accomplished by Section 26 is repugnant to the equal protection clause.[2]

Contrary to respondents' verbalisms (Resp. Br. pp. 8-15) about "disenablement", "state involvement", the "pro-discrimination nature of its purpose", and the like, the decisions below were based on the determination on undisputed facts that California was responsible under the Fourteenth Amendment for private racial discrimination because it changed its legislative policy from one of prohibiting certain racial and religious discrimination to a policy of not prohibiting such conduct (App. p. 52, Pet. pp. 12-17).

Section 26 is a legislative choice which continues in effect one of the most comprehensive anti-discrimination regulatory programs in the nation (See Pet. pp. 12-17).

---

[2]The Court below also relied, especially in *Prendergast,* on an erroneous view of *Shelley v. Kraemer,* 334 U.S. 1, *infra* p. 6, Pet. pp. 17-23.

Section 26 does not put California in the position of "sanctioning and encouraging, indeed inviting private persons to discriminate on racial grounds" (Resp. Br. p. 8) nor did the Court below so hold (App. pp. 40-41, 52-53). The section, as evidenced by the ballot arguments (App. pp. 3-6) as well as the language of the measure viewed in the contemporary context in which it was adopted, is a declaration by the people that the imposition of the coercive sanctions of government on the private owners of residential property is not at this time in the public interest; that freedom from governmental restraint in this narrow area of conduct is more likely to promote satisfactory human relationships than what was deemed to be unnecessary, oppressive, hastily drawn, unfair, and illogical regulations; that in striking the balance between equality and freedom in this area, the State should leave to self-determination the conduct of private persons dealing with their own residential property. See Lewis, *The Sit-in Cases: Great Expectations,* The Supreme Court Review (1963), Univ. of Chi. Press, pp. 101 at 132-133.

Respondents' contrary contentions are as unsound as would be the view that the Boston Tea Party took place to seek a lower price for tea rather than to dramatize a protest against what was considered to be unfair and unwanted governmental regulation.

Fairly analyzed, we repeat, the decisions below squarely raise each of the five questions set forth in the Petition (3-4). Moreover, respondents surely err in asserting that the problem of whether the state is so involved in private racial discrimination as to make the

Fourteenth Amendment applicable is a "question of fact . . . for the review of which this Court's certiorari jurisdiction is ordinarily [not] exercised." (Resp. Br. p. 15). The Court below relied on no factual findings that California or any of its officials or section 26 itself actually influenced the conduct of petitioners in any way. The California Court relied exclusively on its interpretation of the Constitutional principles announced by this Court, in the numerous decisions cited in the opinions below, to an undisputed sequence of legislative activity: The adoption of anti-discrimination statutes followed by the adoption of section 26 which "nullified" those statutes in part and "forestalled" such legislation in future except by popular vote (App. p. 40). The use of active verbs by respondents or by the distinguished Court below—words employed by this Court in fundamentally different contexts—do not convert the important Constitutional questions involved in these cases into nonreviewable questions of fact. They are questions raised by the erroneous application by the Court below of this Court's constitutional principles to the undisputed facts in these cases (Pet. pp. 12-17).

For these reasons, it is also unsound to assert, as respondents do (Resp. Br. pp. 16-17), that the constitutional problems are unique to California and not of general public importance. The issues raised below create a current problem that confronts the people and the legislatures in all states which contemplate the enactment, modification, or repeal of anti-discrimination legislation. (See Pet. pp. 9-11).

II.

The Judgment in Prendergast Below Was Based Squarely Upon Two Alternative Grounds, One of Which Was the Erroneous Interpretation of Shelley v. Kraemer Discussed in the Petition (pp. 17-23).

Both decisions below relied extensively on the extreme interpretation of *Shelley v. Kraemer,* 334 U.S. 1, discussed in the Petition at pages 17-23 (App. pp. 46, 90). Contrary to respondents' contention (Resp. Br. pp. 18-20), the judgment in *Prendergast* was specifically based on two alternative grounds, one of which was that drastic view of *Shelley.* The Court said (App. p. 90):

> "For that reason [e.g. the court's holding that section 26 offended the Fourteenth Amemdment], *as well as those relied upon by the trial court,* defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed." (Emphasis added.)

The *only* ground upon which the trial court relied was the erroneous extension of *Shelley v. Kraemer* to prohibit jural recognition of a private right whenever the motive of the private litigant is one forbidden to the State (App. p. 86). It is hardly accurate to assert that the trial court's opinion was "superseded by the affirming opinion of the Supreme Court" (Resp. Br. p. 18, n. 18) in this case where the Supreme Court specifically places reliance on the grounds "relied upon by the trial court." Thus, the questions set forth in the Petition (3 and 4, at p. 4) relating to *Shelley v. Kraemer* are squarely and necessarily presented.

III.

That Other Parties in Related Cases Have Not Sought Review in This Court Is Not a Valid Reason for Denying the Writ Here Where the Record Is Wholly Adequate to Permit Review of the Questions Presented.

Opposition to review is also based upon the stunning proposition that petitioners should be automatically barred in this Court because others similarly situated did not elect to seek review (Resp. Br. p. 23). This argument is advanced notwithstanding the attorney for one of the others who did not seek review (plaintiff in *Hill v. Miller,* 64 Cal. 2d ...., 64 Adv. Cal. 598, 50 Cal. Rptr. 908) also appears as one of the attorneys for these respondents.

Petitioners are not parties to any of the other related proceedings (Resp. Br. p. 23, n. 23), and their counsel have no authority to appear for any of the parties in any of the other cases. No doubt the trial courts in California will be as able to give general application to such decision as this Court makes should it grant review here as they are in applying this Court's decisions to defendants in criminal cases although they were not parties to the cases in which this Court rendered the decisions.

Finally, respondents assert an "incomplete record" as a reason for denying the writ (Resp. Br. p. 25). The lack of merit in this contention is obvious upon a reading of the opinions of the Court below. The decisions were based on undisputed facts (Pet. pp. 5-7). Even respondents admit that the judgment in *Prendergast* is final and that there is no dispute of fact in the record in that case. Since *Prendergast* presents squarely all

five questions raised in the Petition, we respectfully suggest the Court need not consider respondents' contentions that the *Mulkey* judgment lacks "finality." If they are correct, the judgments in the other five cases are not final either, and the courts below will have ample opportunity to apply in those cases the legal principles this Court announces should it grant the petition here. The proceeding in *Prendergast* affords a complete record, independent of the records in *Mulkey* and the other five cases, for determination of all the questions sought to be reviewed.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,

Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,

Respondents.

Brief for Petitioners on Writ of Certiorari to the Supreme Court of the State of California.

Introduction.

Respondents Mulkey are Negroes who were refused as tenants by petitioner Reitman in his private apartment building. Respondents Mr. Prendergast, a Negro, and his Caucasian wife, were given a thirty-day notice of termination of their oral month-to-month tenancy in the private apartment dwelling owned by Petitioner Snyder. In two separate actions, respondents sued petitioners under a 1959 statute prohibiting racial discrimination in rentals of such apartments. In 1964, by a vote of 4,526,460 to 2,395,747, the California Constitution was amended by the adoption of Proposition 14, which repealed the portions of the statute relied upon by respondents. The California Supreme Court held for respondents, deciding that Proposition 14 offended

the Fourteenth Amendment; and in the *Prendergast* case the court also held that a State court could not constitutionally recognize or enforce Mr. Snyder's otherwise valid termination of an oral tenancy if his motives were based upon the race of his tenant. These are the two judgments here on certiorari.

Opinions Below.

The majority opinion of the Supreme Court of California in *Mulkey, et al. v. Reitman, et al.* [R. 14] is reported in 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P. 2d 825. Two dissenting opinions [R. 31, 49] are reported in 64 Cal. 2d 545 and 559, 50 Cal. Rptr. at 892 and 901; 413 P. 2d at 836 and 845.

The memorandum opinion of the Superior Court of Los Angeles County in *Prendergast v. Snyder* is unreported [R. 71]. The majority opinion of the Supreme Court of California [R. 81] is reported in 64 Cal. 2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847. Two justices dissented [R. 84, 64 Cal. 2d 879, 50 Cal. Rptr. at 905, 413 P. 2d at 849.]

Grounds of Jurisdiction.

The judgments below were entered on May 10, 1966 [R. 14, 81]. A timely petition for rehearing was denied on June 8, 1966 [R. 86, 87]. The Petition for Certiorari was filed August 25, 1966 and granted on December 5, 1966 [R. 88]. The jurisdiction of this Court arises under 28 U.S.C. §1257(3) to review judgments declaring a State constitutional provision invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[1]

[1]Referred to hereinafter, for brevity, as the equal protection clause.

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 26 of Article I of the California Constitution, adopted as an initiative measure (Proposition 14) at the general election on November 3, 1964.

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The operative portion of Section 26 of Article I of the California Constitution (hereinafter referred to as Section 26) provides:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The balance of the measure defines "person" so as to exclude the State and its subdivisions, defines "real property" as residential property, excludes public accommodations, and sets forth a severability clause

(App. 1-2). The full text of Section 26 together with the official ballot arguments are submitted herewith (App. 1-2), as are the pertinent provisions establishing the initiative powers contained in Article IV, Section 1 of the California Constitution (App. 8).

Statutes involved are (i) California Civil Code, Sections 51 and 52 (App. 8-9) as amended in 1959, which will be referred to herein as by the Court below as the "Unruh Act" and (ii) California Health and Safety Code, Section 35700 *et seq.* as amended in 1963 (material portions printed at App. 10-11), which will be referred to herein as by the court below as the "Rumford Act".

Questions Presented.

1. Does the adoption of a State constitutional amendment providing that the State shall not deny the right of an owner of private residential property to decline to sell or rent his property to such person as he chooses, sufficiently involve the State in the private conduct of an individual who refuses to lease his property on grounds of race so as to violate the equal protection clause?

2. Does the equal protection clause itself create an affirmative obligation upon a State to prohibit, or provide a remedy against, or preclude a State from repealing statutory remedies against, racial discrimination in the sale or rental of privately-owned residential property?

3. Does the equal protection clause itself require a State to deny judicial recognition of a landlord's right to possession of his property solely on the ground that he acquired or exercised such right because of the race of his tenant?

4. Did the State court deprive petitioner Snyder of his property without due process of law, or deny him the equal protection of the laws, by refusing, upon the basis of the equal protection clause itself, to recognize or enforce a right to possession available to all landlords, solely on the ground that Mr. Snyder acquired or exercised his right to possession of the apartment involved because one of the married tenants thereof was a Negro?

5. Does the judiciary, State or federal, have the power to invalidate under the equal protection clause a popularly enacted initiative amendment to a State constitution which establishes a policy of nonregulation of private conduct which the State may, but is not required, to regulate?

Statement of the Cases.

Both judgments under review are based squarely on the proposition that Section 26 violates the Fourteenth Amendment to the federal Constitution.[2] The judgment in *Prendergast* was based on the additional ground that the court was barred by the Fourteenth Amendment

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[2]Thus, the California Supreme Court said: "Our resolution of the question of constitutionality [of Section 26 Article I] is confined solely to federal constitutional considerations." [64 Cal. 2d at p. 533, 50 Cal. Rptr. at p. 884, 413 P. 2d at 884, R. 17]; and later: "We are now confronted with those questions"; *i.e.*, " 'grave questions whether the . . . amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution' " [64 Cal. 2d at p. 535, 50 Cal. Rptr. at p. 885, 413 P. 2d at 885, R. 19]. Further: "Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application." [64 Cal. 2d at p. 545, 50 Cal. Rptr. at p. 892, 413 P. 2d at 892, R. 31]. The *Prendergast* judgment was based in part upon this same ground. [64 Cal. 2d 879, 50 Cal. Rptr. at 904-905, 413 P. 2d 904, R. 83].

from giving any relief to a landlord who exercised his right to terminate an oral tenancy on the grounds his tenant was a Negro [R. 71-78, 83-84].

There is no factual dispute. In each case a Negro prevailed over a white landlord who had refused on grounds of race to rent, or to continue to rent, privately-owned residential property.[3] The material proceedings in each case were:

1. Mulkey v. Reitman.

This was an action for damages and injunctive relief commenced in 1963 under the provisions of the Unruh Act against the owner of an apartment building for refusal to rent an apartment to plaintiffs because they were Negroes [R. 2-5]. Following the subsequent adoption of Section 26, the trial court dismissed the action on defendants' motion, solely upon the ground that the latter provision rendered the statutes "upon which this action is based null and void." [R. 10-12]. Plaintiffs unsuccessfully opposed the motion solely on the ground that Section 26 was unconstitutional under the State and federal Constitutions [R. 12]. The Supreme Court of California, with two justices dissenting, reversed, placing its decision entirely upon the federal ground that Section 26 contravened the equal protection clause [R. 14, 17, 31].

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[3]In a related decision, *Hill v. Miller*, 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15, the Court below rendered judgment for the landlord of a single family residence. As will appear (*infra*, pp. 40, 55) this decision is essential to an understanding of the precise basis of decision of the Court below in the cases here under review.

2. Prendergast v. Snyder.

This was an appeal by Mr. Snyder from an adverse judgment on his cross-complaint for declaratory relief against Mr. and Mrs. Prendergast, respectively a Negro and a Caucasian [R. 63-67, 79]. Mrs. Prendergast had rented an apartment from defendant in his seven-unit dwelling on an oral month-to-month tenancy. Later Mr. Prendergast moved into the apartment, and in December, 1964 Mr. Snyder gave his tenants a 30-day written notice of termination of the tenancy [R. 64]. That this notice complied fully with the nondiscriminatory laws of California relating to tenancies at will is not disputed.

After receipt of the notice of termination, plaintiffs sought an injunction against their eviction, relying upon the Unruh Act and urging that statute was in full force notwithstanding the adoption of Section 26 because the latter violated the Fourteenth Amendment [R. 73].

By cross-complaint, Mr. Snyder sought a declaration that the tenancy had been terminated and that he was entitled to possession [R. 63]. It was undisputed that Mr. Snyder terminated the tenancy because he and his wife did not desire to live in the subject apartment building so long as Mr. and Mrs. Prendergast were there, because he did not desire at the present time to rent any of the apartments to Negroes, and because he was faced with severe economic hardship from the threatened loss of rentals from half of his remaining tenants who also did not desire to live in the apartment building so long as the Prendergasts were there [R. 64-65, 59-62, 67-69].

In his cross-complaint, Mr. Snyder asserted his rights (1) to select the persons with whom he would associate, both in the relationship of landlord and tenant and in the continuing relationship of neighbors under the same roof, (2) to acquire, use, enjoy and dispose of his property in any manner he might choose which was not prohibited by statute, ordinance or other legislation, (3) to decline to rent to any particular person or persons or terminate such rental even if his unexpressed reason therefor was the race or religion of the person or persons involved, and (4) to have a court of law recognize and enforce the termination of the Prendergasts' tenancy [R. 65-66, 72].

The trial court found it unnecessary to determine whether Section 26 was valid under the Fourteenth Amendment [R. 73-74]. Relying on *Shelley v. Kraemer,* 334 U.S. 1, it held that the Fourteenth Amendment barred a State court from granting petitioner any judicial relief [R. 80]. With two justices dissenting, the Supreme Court of California affirmed upon the ground that Section 26 violated the Fourteenth Amendment "as well as those [grounds] relied upon by the trial court * * *." [R. 83-84, 64 Cal. 2d at 879, 50 Cal. Rptr. at 905, 413 P. 2d at 847].

3. A Companion Case Below.

In *Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15, the court below affirmed[4] the trial court's judgment for the landlord on demurrer in an action by a Negro tenant to restrain eviction. The court gave two reasons for reaching a decision in *Hill*

[4]After granting a rehearing of its initial decision in which it had reversed the judgment of the trial court, 64 Cal. 2d 598, 50 Cal. Rptr. 908, 413 P. 2d 852.

contrary to that in *Prendergast:* (1) The single-family residence involved in *Hill,* unlike the seven-unit apartment dwelling involved in *Prendergast,* had not been covered by the Unruh or Rumford Acts, and (2) the property owner in *Hill* sought no affirmative relief as had his counterpart in *Prendergast* (64 Cal. 2d at 759 and 760, 51 Cal. Rptr. at 690, 413 P. 2d at 853).

Summary of Argument.

In adopting Section 26 the people of California have removed from a mosaic of laws prohibiting racial and religious discrimination a fragment of private conduct: The individual choice by an owner of private residential property in selecting a buyer or tenant for his own property. California continues a vigorous official policy opposed to racial discrimination in all governmental and in numerous private activities (*infra,* p. 14).

The conduct which Section 26 frees from pre-existing legislative regulation was free from regulation under the common law in California until 1959, is still free from such regulation even in the view of the court below except to the extent it is prohibited by statute (*Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 853, App. 15), and is free from governmental regulation in thirty-one of the remaining States (*infra,* p. 13).

The dispute presented in these cases is the alleged invasion by the individual petitioners of individual rights claimed by respondents respecting private residential property owned by petitioners. From the beginning, this Court has held that individual invasion of individual rights is not the subject matter of the equal protection clause. *United States v. Cruikshank,* 92

U.S. 542, 554-555; *Civil Rights Cases,* 109 U.S. 3, 11; *United States v. Guest,* 383 U.S. 745. This vital principle that *state action* is, and private action is not, prohibited by the equal protection clause is embedded in our national life as well as in the settled jurisprudence of the Fourteenth Amendment. Recognition of the principle is essential to a free, diverse, and democratic society. It forms a part of our moral philosophy "which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil." Freedom is freedom to be selfish or generous, mean or noble, arbitrary or rational, wrong or right. Inherent in the principle are values of federalism allowing the States an area of choice in dealing with conflicting interests and values of their citizens in light of the pressing social and economic problems of a dynamic society, instead of vesting the only power of effective decision in the federal judiciary under Section 1 of the Fourteenth Amendment. The institutional limitations of this Court, in themselves, suggest that the Constitution places no such extraordinary responsibility upon this Court (*infra,* pp. 26, 60).

By invalidating Section 26 as forbidden by the equal protection clause, the court below obliterated the doctrine that private conduct must meet the standards applicable to government only where the State is so significantly involved as to be fairly responsible for it. *Burton v. Wilmington Parking Authority,* 365 U.S. 715. The private conduct of Mr. Reitman and Mr. Snyder in refusing to rent or continue to rent their own private property is the only source of respondents' grievances. The State has no Constitutional duty to prohibit that kind of private conduct or to provide a remedy

for that kind of grievance. The fact that by Section 26 California reestablished its common law rule of nonregulation and thus repealed its statutory rule of regulation is Constitutionally irrelevant. Otherwise, we would have one equal protection clause in California and another more lenient equal protection clause in localities which have not attempted legislative regulations of discriminatory private conduct. Surely the Constitution was not meant to be read so as to vary the substantive content of equal protection rights in direct proportion to the extent of statutory regulation which the temporary incumbents of particular local legislatures decide to impose, thus resulting in the very least Constitutional rights in the very same localities having the very least statutory regulations (*infra,* pp. 17, 24, 28, 37).

This Court teaches that the high standards of conduct imposed upon the States by the Fourteenth Amendment are applicable to nominally private activities only where the State has delegated to private groups extraordinary powers to perform functions bearing a close relationship to sovereignty — such as the combination of electoral officials and "private" political parties whose function was the systematic exclusion of Negroes from participation in the only meaningful elections in certain southern States, as in *Terry v. Adams,* 345 U.S. 461; or the criminal prosecution of a citizen for attempting to express her religious views on a sidewalk open to the public at the instance of a "private" corporation whose authorized function and powers were the same as given by the State to all public municipalities, as in *Marsh v. Alabama,* 326 U.S. 501; or the conduct of "private" institutions in excluding Negroes

from access to services intended for the public generally on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715; or the criminal prosecution of Negroes excluded from places of public accommodations in localities where the State either required such exclusion by law, as in *Peterson v. Greenville,* 373 U.S. 244, or imposed an additional burden by law on those who did not wish to discriminate, as in *Robinson v. Florida,* 378 U.S. 153; or the conduct by the State, either through zoning ordinance, as in *Buchanan v. Warley,* 245 U.S. 60, or by Court compulsion, as in *Shelley v. Kraemer,* 334 U.S. 1, to prohibit willing sellers and buyers from transferring residential property in white neighborhoods (*infra,* pp. 30, 37).

The court below erred in attempting to apply those teachings to the individual private conduct of the petitioners in the performance of the wholly private function of choosing tenants for their own residential property. To preserve the viability of the principle that only "state action of a particular character" is reached by the equal protection clause, to maintain the integrity of the legislative prerogative to determine whether, when, and to what extent the conduct of private persons in their relationships with other private persons should be subjected to governmental regulation, and to recognize that principles of federalism leave such decisions to the States in the absence of valid acts of Congress, the judgments below must be reversed.

ARGUMENT.

I.

SECTION 26 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION IS A VALID EXERCISE OF STATE LEGISLATIVE POWER IN ESTABLISHING AN EVEN-HANDED POLICY OF NONREGULATION OVER THE CONDUCT OF THE OWNERS OF PRIVATE RESIDENTIAL PROPERTY IN CHOOSING THE PERSONS TO WHOM THEY WISH TO SELL OR RENT THEIR OWN PROPERTY, WHILE AT THE SAME TIME LEAVING IN EFFECT EXTENSIVE REGULATIONS PROHIBITING RACIAL AND RELIGIOUS DISCRIMINATION IN ALL GOVERNMENTAL AND IN NUMEROUS PRIVATE ACTIVITIES.

The historical context and contemporary conditions in which Section 26 was adopted demonstrate that its purpose and effect is to leave to self-regulation the decisions of property owners in choosing buyers and tenants of their private residential property, and to rely for the time being on educational, religious, and other statutory influences to improve housing opportunities for disadvantaged groups, including racial minorities. Even after the adoption of its new constitutional amendment, California continues to have more extensive legislative prohibitions of discrimination in housing than 41 other states.[5] Furthermore, the official policy of California is opposed to religious and racial discrimination in many other fields (App. 12-14).

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[5]Fifteen states have enacted legislative prohibitions against racial discrimination in certain types of private residential housing. Six of these have broader exclusions than exist in California even after the adoption of section 26. Three states have such laws applicable only to publicly assisted housing. Thirty-one states have no such laws (App. to Pet. for Cert. 15-24).

The conduct of which respondents complain is the purely private conduct of the owners of purely private residential property. It is only the States, however, and not such private owners who are the addressees of the Fourteenth Amendment, and the States cannot be said to become so significantly involved in such private conduct as to fairly be held responsible for it simply because they do not prohibit it.

By enacting Section 26, California merely reestablished the widely recognized common law rule that a person has no right to acquire an interest in real property from its owner regardless of the owner's reasons or lack of reasons for refusing to deal with him. Such a rule does no violence to the equal protection clause, whether it be announced by State judicial decision, statute, or constitutional provision because it relates solely to the private conduct of private persons in their relationships with other private persons in the performance of a purely private function. The decision to regulate or not to regulate such conduct is the prerogative of the legislature, and the decision when made should not be disturbed by the federal judiciary under section 1 of the Fourteenth Amendment.

A. The Official Policy of California Is Opposed to Racial Discrimination.

(1) The Historical Setting in Which Section 26 Was Enacted.

There is no doubt that the official policy of California is and for many years has been one which opposes racial and religious discrimination.[6] Seventy-four

[6]In addition to the statutes discussed hereafter in the text, there are numerous laws in California which encourage and in

years ago California enacted a statute entitling all citizens to the full and equal accommodations, facilities, and privileges of all "* * * places of public accommodation or amusement * * *".[7] Over the years, this statute was amended from time to time,[8] and in 1959 it was enlarged so as to prohibit racial or religious discrimination "in all business establishments of every kind whatsoever."[9] Its present comprehensive coverage includes such "businesses" as the practice of medicine[10] and the activities of real estate brokers and all persons in the business of selling or leasing residential property.[11]

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some instances require the complete elimination of racial discrimination. A summary of these laws appears in the Appendix (pp. 12-14). See also reference to this pattern of statutes in the dissenting opinion below of Justice Thomas P. White [R. 31-34]. Neither respondents, nor the court below, have ever questioned our assertions that there is no statute, regulation, rule, municipal ordinance or policy of any governmental unit or officer in California which requires, permits, encourages or sanctions racial discrimination; or that the announcements, both official and unofficial, of our highest State constitutional officers, as well as prominent leaders in the Executive and Legislative Branches of our State Government and the statements of the Statewide chairmen of both the leading political parties, and the pronouncements of the California Supreme Court establish that every element of State Government in California strenuously opposes discrimination on the grounds of race, color, creed or national origin. No claim can honstly be made that there is a State-sponsored "mosaic" of discrimination in California. On the contrary, it has a comprehensive official policy against racial discrimination. See Brief in Opposition to Pet. for Cert. p. 16.

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[7]Cal. Stat. 1893, Ch. 185, at 220.

[8]Cal. Stat. 1897, Ch. 108, at 137; 1905, Ch. 413, at 553; 1919, ch. 210 at 309; 1923, Ch. 235 at 485.

[9]Cal. Stat. 1959, Ch. 1866, at 4424; Cal. Civ. Code, §51.

[10]*Washington v. Blampin*, 226 Cal. App. 2d 604, 38 Cal. Rptr. 235.

[11]*Lee v. O'Hara*, 57 Cal. 2d 476, 20 Cal. Rptr. 617, 370 P. 2d 321; *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 20 Cal. Rptr.

(This footnote is continued on the next page)

In 1959, the California Legislature also adopted the "Hawkins Act" prohibiting racial and religious discrimination in "publicly assisted housing accommodations."[12] In 1961, California proscribed restrictive covenants affecting real property and racial conditions in deeds.[13] In 1963, the Hawkins Act was superseded by the Rumford Act, which prohibited racial or religious discrimination by some but not all owners of publicly assisted and private housing and by brokers, financial institutions, and others dealing in the sale, rental, or financing of residential property.[14] This act applied to private dwellings containing more than four units and to most but not all residential property having governmental financial assistance.[15] It would not apply to a publicly assisted duplex,[16] to some single family residences,[17] or to housing accomodations of two to four units, whether or not publicly assisted.[18] The State Fair Employment Practices Commission was empowered to prevent violations and to conduct investigations, educational programs, and conciliation regarding dis-

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609, 370 P. 2d 313; *Swann v. Burkett*, 209 Cal. App. 2d 685, 26 Cal. Rptr. 286 (rental of triplex by owner). However, a real estate broker was not liable if his failure to complete the transaction was due solely to the refusal of the owner of a single family residence to sell on basis of buyer's race. *Vargas v. Hampson*, 57 Cal. 2d 479, 20 Cal. Rptr. 618, 370 P. 2d 322.

[12]Cal. Stat. 1959, Ch. 1681, at 4074; formerly Cal. Health & Safety Code §§35700-35741.

[13]Cal. Stat. 1961, Ch. 1877, at 3976; Cal. Civ. Code §§53, 782. These, of course, have been unenforceable in California at least since the decision of this Court in *Shelley v. Kraemer*, 334 U.S. 1.

[14]Cal. Stat. 1963, Ch. 1853 at 3823; Cal Health and Safety Code §§35700, *et seq.*

[15]Cal. Health & Safety Code §35720, subd. 4, 5.

[16]*Cf.*, *id.* at subd. 1-3 with 4.

[17]*Cf.*, *id.* at subd. 4 with 5.

[18]*Cf.*, *id.* at subd. 1-4 with 5.

criminatory practices in housing.[19] The act was passed in the final evening hours of the last day of the 1963 legislative session.[20]

After an abortive campaign for a referendum to repeal the Rumford Act, an initiative measure known as Proposition 14 was qualified for the ballot after the court below had declined to prohibit the Secretary of State from placing it on the ballot.[21] Proposition 14 was adopted at the November 3, 1964, General Election by a vote of 4,526,460 to 2,395,747 [R. 31] and became Section 26 of Article I of the California Constitution.

(2) The Purpose and Effect of Section 26.

Section 26 is a legislative choice that a particular method of attempting to solve the problem of housing for minorities, *e.g.*, the imposition of direct sanctions upon private residential property owners, shall not be employed at this time, thus re-establishing a policy which existed in California prior to 1959. The measure establishes non-regulation by the State over conduct in the rental or sale of residential property by its owners not only when based on racial or religious discrimination but when done for any reason or for no reason at all. Thus, the Section forbids governmental restric-

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[19]Cal. Health & Safety Code, §§35730 *et seq.*

[20]Note, "The Unconstitutionality of Proposition 14: An Extension of Prohibited 'State Action'", 19 Stan. L. Rev. 232, 237 (Nov. 1966).

[21]*Lewis v. Jordan* (1964), No. SAC 7549 [Unreported Minute Order of June 3, 1964, in which the California Supreme Court stated that while there are "grave questions whether the proposed amendment . . . is valid under the Fourteenth Amendment . . . it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the [California] Constitution and to adopt or reject the same at the polls . . ." (R. 18-19).]

tions upon the privilege of residential property owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance, or whatever. The measure extends its freedom from governmental regulation of individual choice evenhandedly to all private owners of residential property when dealing with their own property without regard to their race, religion or other differences.

The provision is a declaration of neutrality in a relatively narrow area of human conduct: The exercise of the discretion of a property owner not to sell or rent his own residential property. Section 26 does not preclude the creation by legislation of housing opportunities for minority groups or the complete elimination of substandard housing by any private group or governmental body from the federal to the neighborhood level. It does not inhibit programs of relocation, programs designed to raise the educational and economic standards of minorities, direct action to expand the housing market by construction of housing, enlargement of State-financed loan programs, provisions for incentives through loan funds or other aids to those willing to agree not to discriminate, or prohibition of group discrimination, whether based upon agreement, custom or otherwise. It does not affect the existing statutory prohibitions applicable to property owned by the State or any of its subdivisions, property acquired by eminent domain, on property used for provision of lodging accommodations for transient guests (App. 1); nor does it restrict the power of the Legislature to adopt further regulations affecting such property. It does not purport to affect existing or potential State regulation of the exercise of discretion by a real estate broker or others engaged in the business of real estate sales, mortgage financing,

title insurance, and other enterprises having to do, in whole or in part, with dealings in other people's property excepting only where such agents are acting upon the separate instructions of their principal respecting his own private residential property. It would, of course not apply to the alleged activities of suburban communities to exclude unwanted minorities through zoning, subdivision or building regulations. It does not purport to affect any of the numerous areas in which property owners among themselves or in conjunction with the State or federal government voluntarily agree to limit the exercise of their discretion in the sale or rental of their property.

In sum, the legislative policies of California have been these: Prior to 1959, the California legislature had chosen not to regulate the conduct of property owners in choosing their buyers or tenants whether or not the choice was based on race, color or creed. By the Hawkins and Unruh Acts the legislature during the period from 1959 to 1963 chose to regulate racial and religious discrimination in disposition of residential property only as practiced in "publicly assisted housing" or by persons in "business establishments of every kind whatsoever" including persons engaged in the business of selling or renting residential property, brokers, and others. From September 1963 until Section 26 became effective, the legislature, by enacting the Rumford Act, extended that regulation to cover discriminatory conduct by owners of much but not all residential property. Then in November, 1964, by enacting Section 26, the People exercised their legislative prerogative by restoring the former rule that the conduct of a private property owner in refusing to sell or rent his

property for whatever reason should not be regulated by the State but should be left to private self-determination, leaving in full force and effect the existing anti-discrimination legislation regulating activities other than that of the property owner when dealing with his own property.

That policy, being established by an amendment to the State Constitution is, of course, subject to still further repeal or modification by the People. The Court below does not suggest that the division of legislative power between the People and the representative legislature, ordained by the California Constitution (Article IV, §1, App. 8), raises any federal Constitutional question. It is settled that the reservation of legislative power to the People to be exercised through an Initiative procedure is not in itself a violation of any guaranty of the United States Constitution. *Pacific States Telph. & Teleg. Co. v. Oregon,* 223 U.S. 118; *cf., Baker v. Carr,* 369 U.S. 186. Nor is it suggested there is any federal Constitutional prohibition against the particular allocation of power made by Section 26 to the People rather than to the legislature. In *Higgins v. City of Santa Monica,* 62 Cal. 2d 24, 30, 41 Cal. Rptr. 9, 13, 396 P. 2d 41, a unanimous California Supreme Court rejected an argument that a reservation of legislative power by the People rendered a measure unconstitutional.[22] Plainly the fact that Section 26 is a

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[22]"Ordinance 703 may be repealed or amended by the legislative body having jurisdiction so to do, *i.e.*, by the people legislating directly, if it is determined to be wise or proper to open the tidelands to exploration for oil.

"The fact that accomplishment of amendment or repeal through the initiative process may be cumbersome or difficult is not the product of the alleged restriction of future discretion; it is merely

part of the California Constitution rather than an enactment of the State legislature, or for that matter, rather than a principle of law established or in the process of being established by judicial decision, is of no significance to a determination of its validity under the federal Constitution.

It is settled that a State in the exercise of its police power need not deal comprehensively with all aspects of a problem but that it may instead proceed selectively.[23] Thus, in adopting the Hawkins Act in 1959, the California legislature lawfully chose to apply regulation only to owners of housing which was "publicly assisted". The California court upheld the Act against the attack that it contravened the equal protection clauses of the State and federal Constitutions in not imposing similar regulation on owners of private housing. *Burks v. Poppy Construction Company*, 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P. 2d 313.[24] In its unanimous opinion, the California Supreme Court said:

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a characteristic of the kind of legislative system the Constitution of this state has ordained. The significant fact is that the full legislative power of the city remains entirely unimpaired, so that it is available to permit oil development of the tidelands. The ordinance, therefore, no more limits future discretion than does any other prohibitory ordinance admittedly within a city's power to enact." *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30.

[23]*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483; *Tigner v. Texas*, 310 U.S. 141; *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538.

[24]Citing with approval the following cases to the same effect: *Levitt & Sons, Inc. v. State Div. Against Discrim., etc.*, 31 N.J. 514, 158 A. 2d 177, 186-187 [appeal dismissed for lack of federal question, 363 U.S. 418]; *New York State Com. v. Pelham Hall Apts.*, 10 Misc. 2d 334, 170 N.Y.S. 2d 750, 759-761. [In holding state had a right to legislate on a step by step basis by regulating only owners of publicly assisted housing, the court also said: ". . . The state had the right to leave abstention from racial or religious discrimination in such housing accommodations to the conscience of the individuals. . . ."]

"Discrimination based upon race or color in housing provided by the state through its branches or agencies violates the Fourteenth Amendment (*Banks v. Housing Authority*, supra, 120 Cal. App. 2d 1, 16 et seq.) and an extension of the prohibition to private housing receiving public assistance is a reasonable further step in the application of the policy against such conduct. The closer the connection of the discrimination with governmental activity, the more odious its character, and accordingly the Legislature could reasonably conclude that the problem of discrimination is more important in publicly assisted housing than in private housing which has no governmental assistance. * * *" (57 Cal. 2d at 475, 476, 20 Cal. Rptr. at 616, 370 P. 2d at 320).

Likewise, as mentioned earlier, in adopting the Rumford Act, the California legislature properly determined to impose regulation on some but not all owners of private housing and upon brokers, mortgage lenders and others dealing in the sale, rental, or financing of residential property.[25] Similarly in Oregon, the legislature chose to regulate only persons in the business of selling real property; in the 15 states having similar laws, all have taken steps short of total regulation; in 31 states, the legislatures have imposed no such regulation.[26]

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[25]This Act would apparently not apply to a publicly asissted duplex (*Cf.* subd. 1-3 with 4 of §35720 of Health & Safety Code); to some single family residences (*cf.* subd. 4 with 5 of §35720); to housing accommodations of two to four units, whether or not publicly assisted (*cf.* subd. 1-4 with 5 of §35720). (App. pp. 10-11.)

[26]See *supra*, p. 13, n. 5.

In the 1964 Federal Civil Rights Act, the legislature chose to regulate the owners of most public accomodations but not "Mrs. Murphy's Rooming House".[27]

Section 26 is exactly the same kind of legislative decision: A judgment that publicly owned housing and that brokers, financial institutions, aiders and abettors of those who discriminate in the sale or rental of most private housing shall remain regulated but that the owners of private residential property with respect to decisions not to sell or rent their own property shall not be regulated at this time. That judgment was made by a majority of more than 2,000,000 Californians. If this be a legislative abuse, as is urged by respondents, "the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134.

Certainly the constitutionality of this particular legislative choice should not depend upon the sequence of choices California has made in the past. It should be obvious that the substance of the Fourteenth Amendment cannot be modified by adoption of local regulatory legislation, thus precluding subsequent legislative modification or repeal of the regulation. Yet the court below held that although the State had no duty to prohibit racial discrimination in housing, by once having done so by statute, it was thereafter forever barred by the Fourteenth Amendment from even a partial repeal of that statute. This has been aptly described as a "one-way lawmaking" doctrine:

> "* * * . . . a state may withdraw previously existing individual freedom to discriminate, but once that freedom has been withdrawn then the state

[27]Civil Rights Act of 1964, 78 Stat. 241, §201(b)(1).

> may not return to the earlier law. This can only be said to be a pernicious constitutional doctrine taking away from the state or federal government the right to engage in legislative policymaking in an area where there is no constitutional restriction on the state's common law policy." Williams, "*Mulkey v. Reitman* and State Action," 14 U.C.L.A. Law Rev. 26, 30-31 (Nov. 1966).

One of the unacceptable consequences of such a doctrine would be to vary the substantive content of Fourteenth Amendment rights depending upon what regulations have been imposed by the temporary incumbents of local legislative bodies throughout the nation and thus to provide the narrowest set of constitutional rights in those localities which have never tried any legislative solutions. "Our Constitution was not written to be read that way, and we will not do it." *Cf. Bell v. Maryland,* 378 U.S. 226, 318, 335 (Mr. Justice Black, dissenting).

Nothing in the federal Constitution imposes upon California the strait-jacket of perpetual conformity to a local regulatory statute which according to its highest legislature did not accomplish a net gain in promoting satisfactory human relationships.

B. Section 26 of Article I Does Not Violate the Fourteenth Amendment Because All Discriminatory Conduct It Leaves Unregulated Is Private Conduct for Which the State Cannot Fairly Be Held Responsible.

Only last term this Court reiterated the fundamental principle that the Fourteenth Amendment does not lay upon individuals and private institutions the high standards of conduct imposed upon the States:

"It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not . . . add any thing to the rights which one citizen has under the Contitution against another.' *United States v. Cruikshank,* 92 U.S. 542, 554-555. As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.*' *United States v. Williams,* 341 U.S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States v. Cruikshank, supra; United States v. Harris,* 106 U.S. 629; *Civil Rights Cases,* 109 U.S. 3; *Hodges v. United States,* 203 U.S. 1; *United States v. Powell,* 212 U.S. 564. It remains the Court's view today. See e.g., *Evans v. Newton,* ..... U.S. .....; *United States v. Price,* ..... U.S. ....."

United States v. Guest, 383 U.S. 745, 16 L. Ed. 2d 239, 247-48.

The court below, of course, explicitly avowed the principle that it is "state action" only which is within the frame of reference of the Fourteenth Amendment [R. 19]. Its judgments, however, as we shall show, are tantamount to the imposition of the high Constitutional standards of governmental conduct upon the private choices of private citizens in dealings with their own private property.

(1) Regard for Individual Freedom, the Genius of Our Federal System, and the Institutional Limitations of the Judiciary in General and This Court in Particular Compels Continued Recognition of the Fundamental Principle That "State Action" Is, and Private Action Is Not, the Proper Subject for Regulation by Constitutional Adjudication.

The recognition that "state action of a particular character" is, and "individual invasion of individual rights is not the subject matter of the amendment * * *" (*Civil Rights Cases,* 109 U.S. 3, 11), is deeply imbedded in our national life as well as in our fundamental law. As former Solicitor General Cox so eloquently said:

> "It is essential to a free, pluralistic society. It is a product of our moral philosophy, which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil. Freedom, in this sense, is freedom to be foolish as well as wise, to be wrong as well as right."[28]

Continuing, he said:

> "And even if that view were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts. Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth

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[28]Supplemental Brief of the United States as Amicus Curiae (in *Griffin v. Maryland,* 378 U.S. 130, *Barr v. Columbia,* 378 U.S. 146, *Bouie v. Columbia,* 378 U.S. 347, *Bell v. Maryland,* 378 U.S. 226, and *Robinson v. Florida,* 378 U.S. 153) at page 10.

> Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court."[29]

The adoption of such expansive jurisdiction by this Court would at once undermine the separation of powers between the federal and State governments; narrow the area within which the States might endeavor to balance the conflicting claims of liberty, privacy, and equality; discourage the initiative of legislatures, local, State, and federal; and indeed undertake a function which the legislatures are infinitely better suited and equipped to handle. The problem is in part one of the ability of this Court to cope with vast numbers of cases. It is, however, equally a problem of identifying and yielding to that institution of government which is most capable of dealing with the problem in a pragmatic, equitable, and democratically responsible fashion. Where the ultimate resolution of dynamic social problems necessarily requires the constant reweighing in localized contexts of individual rights and obligations and of conflicting values of constitutional proportion, rigid constitutional mandates can only inhibit the fashioning of suitable remedies at all levels of government. See generally, *Lewis, "The Sit-in Cases: Great Expectations"*, The Supreme Court Review (1963), Univ. of Chicago Press, pp. 101, 128-29. See also Professor Freund's Owen J. Roberts Memorial Lecture, "New Vistas in Constitutional Law", 112 Univ. of Penna. L. Rev. 631, 639-644 and his statement entitled "Constitutional Bases for the Public Accommodations Bill" (*e.g.* the Civil Rights Act of 1964), Senate Report 872, 88th Cong; 2d Sess., 1964, pp. 82, 88-92; Archibald Cox, "Foreword: Constitutional

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[29] *Id.* at pp. 87-88.

Adjudication and The Promotion of Human Rights," 80 Harv. L. Rev. 91, 94, 98, 104-5, 110-111, 118-122. (Nov. 1966)

(2) The Fourteenth Amendment Does Not Require the States to Adopt or Retain or This Court to Impose Laws Prohibiting, Regulating, or Otherwise Interfering With the Discretion of the Owners of Private Residential Property in Choosing Their Tenants or Buyers.

By invalidating Section 26 the court below has held that the failure of California to provide a remedy which it once provided against racial discrimination by the owners of some private residential property violates the equal protection clause. The highest courts of other States and of certain lower federal courts have uniformly held that, to the contrary, the Fourteenth Amendment does not of its own force impose a duty upon the States to provide—or maintain—remedies against the following types of discriminatory private conduct:

1. Refusal of owner to sell or rent private residential property.[30]

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[30] *Dorsey v. Stuyvesant Town Corporation,* 299 N.Y. 512, 87 N.E. 2d 541, 547 [not unconstitutional though "Legislature deliberately refrained from imposing any restriction upon a redevelopment company in its choice of tenants."], cert. den. 339 U.S. 981; *Hackley v. Art Builders, Inc.* (D. Md.), 179 F. Supp. 851; *Jones v. Mayer* (E.D. Mo.), 255 F. Supp. 115; *Novick v. Levitt & Sons* (Sup. Ct. N.Y.), 200 Misc. 694, 108 N.Y.S. 2d 615; and *Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15. See also: *Bell v. Maryland,* 378 U.S. 226, 318 (dissenting opinion) and cases cited in n. 24, *supra,* p. 21.

Accord: Traynor, "Law and Social Change in a Democratic Society" (1956) Univ. of Ill. Law Forum, pp. 220, 239 [". . . He has a right to choose his friends, to determine who may come upon his property or to whom he will sell it . . ."]

2. Discrimination by real estate brokers.[31]
3. Religious discrimination by owner of apartment complex housing 35,000 residents[32]
4. Discriminatory refusal of service in places of public accommodation.[33]
5. Discrimination by employers.[34]
6. Discrimination by owner of cemetery.[35]
7. Discrimination by testators.[36]

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[31]*McKibbin v. Michigan Corporation & Securities Com'n.*, 369 Mich. 69, 119 N.W. 2d 557; *Jones v. Mayer* (E.D. Mo.), 255 F. Supp. 115.

[32]*Watchtower Bible and Tract Society v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E. 2d 433, cert. den., 335 U.S. 886.

Accord: *Hall v. Virginia*, 335 U.S. 875, Reh. den., 335 U.S. 912, summarily dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369 [conviction of trespass affirmed as against contention that statute permitting owner of 60 unit apartment to exclude Minister of Jehovah's Witness' sect from distributing religious tracts in the entrance, elevators, hallways thereof was deprivation of rights of free speech, religious freedom, etc.]

[33]*State v. Brown*, 55 Del. ...., 195 A. 2d 379 [upholding statute permitting discrimination by innkeepers in derogation of common law]; *Williams v. Howard Johnson's Restaurant* (4th Cir.), 268 F. 2d 845; *Williams v. Hot Shoppes, Inc.* (D.C. Cir.), 293 F. 2d 835; *Willaims v. Howard Johnson's Inc. of Washington* (4th Cir.), 323 F. 2d 102, cert. den. 382 U.S. 814, reh. den. 382 U.S. 933.

In the latter case, the Court of Appeals said: "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of deprivation of the equal protection of the law would be totally to emasculate existing case law. . . ." (at p. 106).

[34]*Black v. Cutter Laboratories* (Cal.), 43 Cal. 2d 788, 278 P. 2d 905, cert. den. 351 U.S. 292; *Jones v. American President Lines*, 149 Cal. App. 2d 319, 308 P. 2d 393; *cf. Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98, concurring opinion: "Of course a State may leave abstention from such discriminations [by employers] to the conscience of individuals."

[35]*Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. 2d 110, aff'd by equally divided court, 348 U.S. 880, vac. and cert. dism., 349 U.S. 70.

[36]*In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844; app. dism. and cert. den., 357 U.S. 570; *Gordon v. Gordon*, 332 Mass. 197, 124 N.E. 2d 228; *United States National Bank v. Snodgrass*, 202 Or. 530, 275 P. 2d 860; *cf. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230.

We recognize, of course, that "significant involvement" by the State in such discriminatory conduct invokes Fourteenth Amendment responsibilities even though private choice may be the direct source of the injury. This verbal principle was employed by the court below to strike down Section 26 in misplaced reliance upon decisions of this Court involving important relationships between individual citizens and their government.

To be sure, the Fourteenth Amendment protects the right of a private citizen to participate without regard to race in the governmental machinery of an election,[37] the right of a citizen to freedom of speech on the streets of a community authorized by the State to perform exactly the same kind of functions as a publicly owned municipality,[38] the right of an association to be free from compulsory disclosure to the State of the names of its rank and file members in circumstances where the State has no legitimate interest in such information and which will deter freedom of speech and association,[39] the right of a citizen to secure without regard to his race an education from a school owned and operated by the government,[40] or to secure services,

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[37] *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461; *Nixon v. Condon*, 286 U.S. 73; *Rice v. Elmore* (4th Cir.), 165 F. 2d 387, *cert. den.*, 333 U.S. 875; *Baskin v. Brown* (4th Cir.), 174 F. 2d 391; *cf. Baker v. Carr*, 369 U.S. 186.

[38] *Marsh v. Alabama*, 326 U.S. 501.

[39] *NAACP v. Alabama*, 357 U.S. 449.

[40] *Brown v. Board of Education of Topeka*, 347 U.S. 483; *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878; *Branche v. Board of Education of Town of Hempstead* (D.C. N.Y.), 204 F. Supp. 150. See, *Bell v. School, City of Gary Indiana* (7th Cir.), 324 F. 2d 209, 213; *cert. den.*, 377 U.S. 924; *Downs v. Board of Education of Kansas City*, 336 F. 2d 988, 998; *cert. den.*, 380 U.S. 914.

without racial discrimination, which are owned, operated, controlled or financed by the government,[41] or the right to be free from racial discrimination by an officer or agent of the State,[42] or the right to be free from criminal prosecution for disobeying a law or command of the State that *requires* discrimination on grounds of race,[43] or the right to be free of racial discrimination in a municipal park in the maintenance and operation of which the government continued to be involved.[44] But all of these cases deal with the rights of a citizen *vis-a-vis* his government. In such relationships, the strictures of the Fourteenth Amendment are of course applicable.

Last term's decision in *Evans v. Newton* confirms the continued vitality of the principle that State involvement in private discrimination is found only where the nominally private conduct is so intertwined with gov-

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[41]*Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877; *Holmes v. City of Atlanta*, 350 U.S. 879; *Lucy v. Adams*, 350 U.S. 1; *Board of Trustees of the University of North Carolina v. Frasier*, 350 U.S. 979; *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54; *State Athletic Commission v. Dorsey*, 359 U.S. 533; *Florida ex rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413; *Simkins v. Moses H. Cone Hospital* (4th Cir.), 323 F. 2d 959; *Smith v. Holiday Inns of America, Inc.* (6th Cir.), 336 F. 2d 630.

[42]*Catlette v. United States* (4th Cir.), 132 F. 2d 902; *Lynch v. United States* (5th Cir.), 189 F. 2d 476, *cert. den.*, 342 U.S. 831; *United States v. Given*, 25 Fed. Cas. 1324; *Lombard v. Louisiana*, 373 U.S. 267; *Griffin v. Maryland*, 378 U.S. 130; *Screws v. United States*, 325 U.S. 91; *Monroe v. Pape*, 365 U.S. 167; *Williams v. United States*, 341 U.S. 97; *Yick Wo v. Hopkins*, 118 U.S. 356; *Oyama v. California*, 332 U.S. 633; *Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617.

[43]*Peterson v. Greenville*, 373 U.S. 244; *Gober v. Birmingham*, 373 U.S. 374; *Shuttlesworth v. Birmingham*, 373 U.S. 262; *Robinson v. Florida*, 378 U.S. 153; *Lombard v. Louisiana*, 373 U.S. 267.

[44]*Evans v. Newton*, 382 U.S. 296.

ernmental policy that the State can fairly be charged with responsibility for the private conduct. 382 U.S. 296, at 298, 299.

There the Court assumed, *arguendo,* that the Constitution does not prohibit the operation of parochial schools; it did not dispute the holdings in the Girard Trust cases (*Pennsylvania v. Board of Directors of City Trusts,* 353 U.S. 230, *In re Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844, app. dism. and cert. den. 357 U.S. 570); the Court stated that "the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions" (382 U.S. at 300). The Court said that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations" (382 U.S. at 294); in short, the Court seems to have limited its "public function" rationale (relied on in any event only to "buttress" its narrow holding) to activities, such as a park, a fire or police department that "traditionally serves the community", and to such traditional governmental functions as the government of a town as in *Marsh v. Alabama,* 326 U.S. 501, the conduct of an election as in *Terry v. Adams,* 345 U.S. 461, and the providing of public utilities under a legal monopoly granted by the State as in *Public Util. Com. v. Pollak,* 343 U.S. 451 (382 U.S. at 299).

Nothing in the majority or concurring opinions takes issue with Mr. Justice Harlan's statement of the law applicable to *private* discriminations:

> "The Equal Protection Clause reaches only discriminations that are the product of capricious state action; it does not touch discriminations whose origins and effectuation arise solely out of individual predilections, prejudices, and acts. *Civil Rights Cases,* 109 U.S. 3. So far as the Fourteenth Amendment is concerned the curtailing of private discriminatory acts, to the extent they may be forbidden at all, is a matter that is left to the States acting within the permissible range of their police power." (382 U.S. at 316, dissenting opinion).

The Court below did not discuss or resolve the vital difference between the purely private conduct which is affected by Section 26, and the public conduct in the performance of traditionally governmental functions which was crucial to the decisions it relied upon. The conduct affected by Section 26 is the refusal by private persons to deal with other private persons in the rental of their own private residential property for whatever reason or for none at all. The reason in these cases was based on racial discrimination, but it was still private conduct for which the State cannot fairly be held responsible under the Fourteenth Amendment.

The State can be said to be "responsible" for the discriminatory conduct of petitioners only in the attenuated sense that it has chosen not to exercise its coercive power at this time to regulate such conduct in the very narrow area to which Section 26 applies. Whether State "responsibility" has been fulfilled in the sense that it could but did not prohibit certain evils, is largely a question of judgment. The wisdom and necessity of legislative coercion in the field of discrimination by the owners of

private residential property in particular places and times is a question on which there "are rational arguments on either side and, quite clearly, there is room for difference of opinion here among reasonable men who share a common opposition to racial discrimination." Rice, *Bias in Housing: Toward A New Approach,* 6 Santa Clara Lawyer 162, 167-168 (Spring, 1966).][45]

Is anyone so omniscient to say with confidence that the balance struck by Section 26 is wrong? Is it absurd to believe that individual freedom of the owners of private residential property should not be subjected to governmental inquiry and sanction where other remedies now in effect and still others yet available may prove equal to the challenge? Is it plainly unreasonable to remove governmental sanctions where it is believed by an overwhelming majority of the people that nonregulation is more likely to achieve a harmonious and satisfactory solution to the housing problems of

[45]Differences of opinion on the desirability or need for this kind of legislative sanction are manifest from the House and Senate Hearings and the House debates in the eighty-ninth Congress, Second Session, concerning Title IV of the proposed Civil Rights Act of 1966 (H.R. 14765) which would have imposed federal sanctions upon racial and religious discrimination in housing. See: Material in Support of the Bill on Constitutional Grounds: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U. S. Senate, 89th Cong., 2d Sess (1966), at 84-86; 86-88; 102-105; 122-125; 125-129; 1148-1149; 1150; 1161-1164; 1164-68; 1170 and 112 Cong. Rec. 16071-16075 (daily ed. July 25, 1966). Materials in Opposition to the Bill on Constitutional Grounds: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966) at 60-63; 98; 118-122; 129-135; 135-139; 140-147; 384-387; 601-606; 613-614; 699-710; 837-839; 891-899; 905-910; 938-941; 1033-1037; 1069; 1071-1072; 1151; 1590-1592] 1691-1694; and 112 Cong. Rec. 16326 (daily ed. July 26, 1966); 16969-16970 (daily ed. Aug. 1, 1966); 17334-17335 (daily ed. Aug. 3, 1966); 17595 (daily ed. Aug. 5, 1966); 17912 (daily ed. Aug. 9, 1966). Material in Support of the Bill on Other

minorities than the wholesale imposition of the coercive power of government on myriads of individual citizens? Must the State, whatever the cost or whatever public opinion may be, impose total regulation on discriminatory acts of homeowners? If a State chooses to leave some areas of human conduct to the consciences of its citizens, is it fair to hold the State responsible merely because some of its citizens have no conscience?

The court below imposed constitutional responsibility upon the State for having made the legislative choice not to prohibit private conduct which it had the power, although not a duty, to proscribe [R. 41]. The logical result of this far-reaching proposition is that virtually *all* conduct is brought within the Fourteenth Amendment and subject to appraisal on Constitutional standards by this Court. Such a holding neither is nor should be the law.

Grounds: Hearings Before the Subcommitte on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966), at 82-84, 86; 362-384; 1392-1396; 1401-1428; and 112 Cong. Reg. 16075-16076 (daily ed. July 25, 1966); 17595 (daily ed. Aug. 5, 1966). Material in Opposition to the Bill on Other Grounds: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966), at 282-294; 349-357; 388-389; 849-850; 869; 873; 1063-1067; 1091-1094; 1108-1109; 1149; 1156-1160; 1177-1178; 1502-1507; and 112 Cong. Rec. 16318 (daily ed. July 26, 1966); 16319 (daily ed. July 26, 1966); 16320 (daily ed. July 26, 1966); 16419-16420 (daily ed. July 27 1966); 16719-16721 (daily ed. July 28, 1966); 16741-16742 (daily ed. July 28, 1966); 17340 (daily ed. Aug. 3, 1966); 17594 (daily ed. Aug. 5, 1966). Material in Support of State Fair Housing Laws: 112 Cong. Rec. 1347-1351 (daily ed. Jan. 28, 1966); 1351-1359 (daily ed. Jan. 28, 1966). Material in Opposition to State Fair Housing Laws: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966), at 854; 822; 918-921; 923-928; 944-961; 1073-1074; 1082-1083.

Can there be any doubt that a state has the power to prohibit racial discrimination in the operation of a private school? an employment agency? the practice of medicine? or law? an eating establishment even though it is called a private club and requires payment of dues? to declare unlawful any testamentary disposition of property conditioned upon race or religion? or to prohibit any and all arbitrary or unreasonable conduct which causes any harm to others? Indeed, cannot the State, under its broad police powers, establish reasonable prohibitions or requirements concerning practically all conduct excepting only such private conduct as is itself protected by the Constitution?

The necessary corollary of the decisions below is that the State *must* regulate all conduct which it *may* regulate or run afoul of the Fourteenth Amendment. Such a rule would denude the States completely of all discretion to decide whether or not regulation is desirable or necessary under the varying circumstances in each State and constitute an outright cession to this Court of all power and duty to make or veto all of such decisions.[46] The result would be a status of all-pervasive, total regulation. Total regulation, not by Congress, not by a State or local legislature, not by any

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[46]See the analysis of this thesis by Professor Lucas in 13 Buffalo L. Rev. 443-449; by Professor Lewis in "The Sit-in Cases: Great Expectations," The Supreme Court Review (1963) Univ. of Chi. Press. pp. 101 at 114-116 and his paper "The Meaning of State Action," 60 Col. L. Rev. 1083, and by Professor, then Solicitor General Cox, quoted *supra*, p. 25 and *infra*, p. 61. See also, *Kauper, Civil Liberties and the Constitution*, Univ. of Mich. Press (1962) at page 137: "The point here stressed, however, is that the power of the state to [adopt legislation prohibiting racial or religious discrimination in various activities] is a discretionary power and is not to be confused with a *duty* imposed by the Fourteenth Amendment to enact this kind of legislation."

State court, but total regulation solely by one, albeit our highest, Court. Such a result is contrary to our Constitutional plan, unsound in principle, and inconsistent with this Court's decisions from the beginning.

(3) By Its Legislative Determination Not to Impose Governmental Sanctions Upon Private Persons in Choosing the Persons to Whom They Will Dispose of Their Own Residential Property for Whatever Reason Their Consciences Dictate, California Did Not "Authorize" or "Encourage" or Become "Significantly Involved" in Private Conduct Based Upon Race, Religion, or Any Other Arbitrary Ground.

The court below held that California was responsible under the Fourteenth Amendment for the purely private racially discriminatory conduct of Mr. Reitman and Mr. Snyder. Such responsibility was fixed solely because in adopting Section 26 the people of California had "nullified" previously enacted legislation prohibiting such conduct and "forestalled" such legislation in the future except by further vote of the people[47] [R. 18-19].

It was this sequence of legislative activity alone that the court below ultimately relied upon in concluding that the State so "permits", "encourages", "authorizes", and is so "significantly involved in" private discriminatory conduct as to be responsible for it under the Fourteenth Amendment. The quoted words were imported from decisions of this Court rendered in cases

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[47]As previously noted, *supra*, p. 2 in *Prendergast*, the Court also held, relying upon *Shelley v. Kraemer*, 334 U.S. 1, that judicial recognition of the rights here asserted by the property owners against Negro tenants would violate the Fourteenth Amendment even if Section 26 were itself valid. This proposition is discussed under point II hereof, *infra*, p. 48 *et seq.*

involving conduct in the performance of inherently public or governmental functions, such as the conduct of primary elections, the exercise of municipal power by a town, or the operation of a municipal park in which there had been no change in "municipal maintenance and concern" and whose "predominant character and purpose" was municipal (*supra,* p. 30). To apply such decisions to the private conduct of private persons in the disposition of their private residential property is to make utter nonsense of many decades of jurisprudence establishing the fundamental distinction between private and "state" action.

More specifically, the holdings below rest upon the following wholly inaccurate comparisons of the facts of the cases at bar with the subject matter of prior decisions of this Court:[48]

> (a) The conduct of the private owners of residential property is equated with the conduct of institutions engaged in providing services to the public on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715; and *Turner v. City of Memphis,* 369 U.S. 350; *cf. Evans v. Newton,* 382 U.S. 296 [R. 24-28].

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[48]The conflict of the decisions below with prior decisions of this Court is analyzed in the following commentaries: Williams, "*Mulkey v. Reitman* and State Action", 14 U.C.L.A. L. Rev. 26; Horowitz and Karst, "The Proposition Fourteen Cases: Justice in Search of a Justification," 14 U.C.L.A. L. Rev. 37; Donnici, "State Responsibility for Residential Racial Discrimination: The Decline and Fall of California's Proposition 14," 1 Univ. of S. Fran. L. Rev. 12; Note, "The Unconstitutionality of Proposition 14: An Extension of Prohibited 'State Action'", 19 Stan. L. Rev. 232. "Editors' Case Note; State Encouraged Discrimination: *Mulkey v. Reitman* (Cal. 1966)," 6 Santa Clara Lawyer 241 (Spring, 1966).

(b) The private conduct of petitioners in choosing tenants of their own residential property is equated with the joint conduct of the arresting officer, prosecutor, court, jury, and jailer in Chickasaw, Alabama, the company-owned town authorized by the State to exercise all the governmental powers of a public municipality. *Marsh v. Alabama,* 326 U.S. 501 [R. 23].

(c) The private conduct of petitioners is equated with the conduct of the elaborate electoral institutions which in combination with State officials caused all Negroes to be systematically excluded from all participation in the only meaningful elections in certain southern States. *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461; *Nixon v. Condon,* 286 U.S. 73, see also *Anderson v. Martin,* 375 U.S. 399 [R. 23-24].

Contrary to the situation in the cases relied upon by the court below, petitioners here are not performing any function at all except making a private selection of whom they desire as tenants in their own private residential property. That decision is a personal and independent judgment which has not been forced upon them directly or indirectly by the government. Their relationship as property owners with the government is the same as that between all property owners and the government. While they are not penalized for making an arbitrary choice, neither are they rewarded for making a choice be it arbitrary or rational. In no way can it be said that these owners of private residential property have been delegated any power which is even remotely akin to the power to govern a community or to control the governmental electoral processes, nor is their

conduct in deciding to terminate a tenancy on grounds of race remotely comparable to the arrest and conviction of a "trespasser" in places of public accommodations or to the deprivation on racial grounds of the right of a citizen to participate in the process of enacting public laws and electing public officials.

Demonstrably, the court below did not find that Section 26 in fact encourages or authorizes racial discrimination. *Mulkey* could not have been decided on that ground because there the discriminatory conduct occurred in 1963 before Section 26 was proposed or adopted [R. 3]. More significantly, had the court found Section 26 to have actually encouraged or authorized discrimination it could not concurrently have decided *Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15, as it did—permitting the landlord to prevail where he expressly relied on what he asserted was the "right" given him by Section 26 to refuse to rent to Negroes (App. 16). The California Court necessarily held that the State was free to adopt and maintain a common law rule which did not prohibit racial discrimination by the owner of private property (*Hill v. Miller*), but that it was unconstitutional for the State to restore such a common law rule once it had been abrogated however temporarily by statute (*Mulkey v. Reitman* and *Prendergast v. Snyder*). In other words, it was the partial repeal of pre-existing anti-discrimination statutes that the California Court found to constitute unconstitutional State involvement in and authorization and encouragement of racial discrimination.

As further rationalization of its decisions, the court below sought to equate Section 26 with the statutes in *Robinson v. Florida,* 378 U.S. 153; *Evans v. Newton,*

382 U.S. 296 (as construed in the concurring opinion of Mr. Justice White), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (as construed in the concurring opinion of Mr. Justice Stewart) [R. 24-28]. The vices of those statutes were, respectively, the imposition of a greater burden upon one who chose not to discriminate in the operation of a restaurant,[49] the legalization of discrimination on grounds of race but on no other grounds in the establishment of public trusts,[50] and the classification on racial grounds of the right of access to public accommodations.[51]

Section 26 applies to all property owners. It in no way burdens those who do not discriminate. It neither condemns nor authorizes any basis of decision by a property owner with respect to the choice of persons with whom he will deal. It certainly does not single out and favor racial as opposed to other forms of discrimination.

In *Burton*, eight of the justices treated the Delaware statute as reflecting the common law that a private restaurant operator could refuse service to anyone for any reason or for none (365 U.S. 715, 721, 727, 730). That is the plain effect of Section 26: It reestablishes the common law rule that was in effect until 1959 when California adopted the first of its statutes prohibiting racial and religious discrimination in housing.

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[49] *Robinson v. Florida*, 378 U.S. at p. 156. In that case this Court relied upon *Peterson v. Greenville*, 373 U.S. 244, where the city ordinance compelled racial discrimination by private restaurant owners.

[50] *Evans v. Newton*, concurring opinion of Mr. Justice White, 382 U.S. 296, at p. 303.

[51] *Burton v. Wilmington Parking Authority*, concurring opinion of Mr. Justice Stewart, 365 U.S. at p. 726. See *Lewis*, "The Sit-in Cases: Great Expectations", The Supreme Court Review (1963), Univ. of Chi. Press, p. 145, n. 100.

Respondents seek to justify the decisions below by asserting an additional equation (not accepted by the court below) that the conduct of petitioners in the context of widespread private racial discrimination in residential housing is the legal equivalent of a racial zoning ordinance.[52] That asserted parallel is based upon a factual premise that is not supported by the record or by the findings of the court below, one that is subject to grave doubt in light of the overwhelming public policy opposing racial discrimination, the comprehensive regulations prohibiting racial discrimination by persons engaged in the business of dealing in other people's residential property, and the mounting tide of public opinion opposed to racial discrimination in housing and elsewhere.

In any event, it would not follow that the sole or even a substantial cause of minority neighborhoods is the personal prejudice of white property owners. Personal preference, habit, poverty, ignorance, an inadequate supply of moderately priced accommodations, and a complex array of sociological and economic factors have brought about racial separation in residential housing. Nor is there reliable evidence that prohibition by law of private discrimination would necessarily or even probably, either alone or in combination with other governmental programs, make a substantial contribution to integrated housing.[53]

The complexity of these problems of cause and effect is in itself proof that the manner in which and

[52]Brief in Opp. to Pet. for Cert., p. 15, n. 16.

[53]See the materials cited in n. 45, *supra* p. 34. Much of the literature on this subject (see Br. in Opp. to Pet. for Cert. p. 5, n. 7) appears to be authored by strong advocates of comprehensive governmental assistance to housing and governmental

the time at which any particular phase of the problem shall be attacked by the government, the choice as to which causes are the more pressing for solution, and the balancing of the evil to be cured against the harm of any particular regulation are matters for legislative judgment. See *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 400; *American Fed. of Labor v. American Sash & Door Co.,* 335 U.S. 538, 542.

In arguing that Section 5 of the Fourteenth Amendment empowers Congress to prohibit discrimination in housing, Professor Cox says:

> "* * * Under *Guest* a conspiracy to deter Negroes, by violence and threats of violence, from buying property anywhere in a community would be a proper subject of federal cognizance because it would defeat the practical enjoyment of the legal right, even though the right survives conceptually. Surely the case is the same if the whole community, by express conspiracy or unspoken custom, refuses to sell any property to Negroes; the scope of power of Congress does not depend upon whether it is forbidding aggressive acts or imposing affirmative duties. One's impression is quite different if he thinks of a single refusal and unconsciously assumes that ample property of every description is otherwise available, for in that event to speak of diminution of the civil right to buy and sell seems artificial.

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regulations of all conduct thought to contribute to inadequate housing or to delay the creation of integrated neighborhoods. That the causes of segregated housing and the creation of adequate housing opportunities for minority groups and others are enormously complex problems (and that causes and cures are primarily economic) is evidenced by Report on Housing in California. Governor's Advisory Commission on Housing Problems, Calif. State Printing Office, January, 1963.

> The truth doubtless varies from one community to another and often lies between the two extremes; but, under *Katzenbach v. Morgan,* finding the facts and appraising their significance is exclusively a legislative function. * * *" ("Foreword; Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, 118, Nov. 1966)

The debate continues in California and elsewhere (*supra,* pp. 13-23) as to the need or desirability of fair housing laws and to what remedies should be afforded and as against whom in this field. As Mr. Justice Frankfurter said:

> "Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people. If the proponents of union-security agreements have confidence in the arguments addressed to the Court in their "economic brief," they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give."

(Concurring in *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553, footnote omitted.)

Regardless of whether respondents' argument should more properly be addressed to the legislature, their effort to liken Section 26 to State delegation of the governmental function of zoning because of the alleged similarity of result (*e.g.*, "*de facto* zoning") is plainly specious.[54] If all the citizens of Chickasaw, Alabama, had independently refused at their doorsteps to accept or read the proferred religious literature, the effect on Mrs. Marsh's purpose in communicating her religious views would have been equally devastating, but it does not follow that Alabama would therefore be held responsible. In *Marsh v. Alabama*, 326 U.S. 501, the State was responsible because the power of government was brought to bear by the arrest and conviction of Mrs. Marsh for refusing to leave a public sidewalk which had been dedicated to public use by an instrumentality having all the powers delegated by the State to all municipal governments.

The principle of *Marsh* has been held not to extend to private control of the interior of a housing project of 35,000 tenants by the owners, *Watchtower Bible & Tract Society v. Metropolitan Life Ins. Co.* (N.Y.), 69 N.E. 2d 433, cert. den. 335 U.S. 886, and to a privately owned, publicly financed, housing development of 25,000 capacity alleged to discriminate on racial grounds, *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541, cert. den. 339 U.S. 981. See also *Hall v. Virginia*, 335 U.S. 875, reh. den. 335 U.S. 912, dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369.

[54] Br. in Opp. to Pet. for Cert., p. 15, n. 16.

The Constitutionally relevant characteristics of discriminatory zoning ordinances are notably the imposition of compulsory regulations by the government itself, the imposition of coercive sanctions on nonconsenting owners and prospective owners of real property, and applicability to large areas over an indeterminate period of time. Even concerted action by private persons cannot have an impact comparable to the coercive power of government. Moreover, concerted action by a group of property owners to discriminate on racial grounds in the sale or rental of housing in their neighborhood may be already prohibited by a portion of the Rumford Act unaffected by Section 26, which relates only to the individual decision of a property owner in disposing of his own property (App. 10).

The conduct left unregulated by Section 26 bears none of the attributes of either governmental functions or concerted private activity. The conduct here involved is that of a private person made in the disposition of his own property. It is individual conduct and not conduct in concert with others. It is conduct which relates only to the actor's own property at a time when he is still the owner and not conduct which is sought to be imposed on unwilling transferees either indefinitely or over a period of years. It is conduct relating exclusively to the decision of one citizen not to dispose of his own property to another citizen, uninfluenced by any governmental reward or penalty. It is a decision in which the government does not participate. It is certainly conduct which is not required by the State to be based on

arbitrary grounds. It is conduct in the performance of a function which free men have long considered to be their privilege in the absence of valid legislation under the police power, a function which never has been viewed and cannot be truly classified as governmental in character.

These are the controlling factors in determining the Constitutionality of Section 26. This Court teaches that Fourteenth Amendment duties are imposed upon a private agency to which the State has delegated directly or indirectly extraordinary powers to perform a function which bears a close relationship to sovereignty—such as voting, municipal government, or zoning and its incidents of concerted action, sanctions, and binding effects on nonconsenting property owners over a period of years. To apply those teachings to the conduct of a private property owner in the performance of the private function of choosing a buyer or tenant of his own property is to make a mockery *first,* of this Court's painstaking emphasis on the truly governmental character of the private agencies involved in the voting, company town and restrictive covenant cases and of the function they were empowered to perform by the State, and *second* of the repeated admonitions of the Court that the Fourteenth Amendment does not reach purely private conduct.

II.

NEITHER SHELLEY V. KRAEMER NOR THE EQUAL PROTECTION CLAUSE REQUIRES STATE COURTS TO REFUSE TO RECOGNIZE OR ENFORCE RIGHTS SOLELY BECAUSE THE LITIGANT'S MOTIVATION IN ACQUIRING OR ASSERTING THEM WAS AFFECTED BY HIS RACIAL DISCRIMINATION.

In *Prendergast*, the California Court, relying on *Shelley*, held that a State court would violate the equal protection clause merely by entertaining or ruling on a defendant's plea for declaratory relief with respect to the validity of his private termination of a lease of his private property and of his right to possession of that property if the termination had been based upon the racial prejudice of the defendant.[55]

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[55]The California Supreme Court expressly adopted the reasons relied upon by the trial court as an independent ground of its decision that the equal protection clause forbade judicial recognition of the landlord's termination of a tenancy at will where the landlord's action was based upon the fact that his tenant was a Negro [R. 76, 83-84]. The trial court had held the decision of the California District Court of Appeals in *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, was determinative of the case, whether or not it was sound. *Prendergast v. Hill* (L. A. Sup. Ct.), R. 71, 74, 76.

In *Abstract*, the court had held, on the basis of its expansive interpretation of *Shelley v. Kraemer* and *Barrows v. Jackson*, that it was "reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the defendant tenant was admittedly in default." [R. 22]. The reason given for the holding was that the defense of discrimination "if proven would bar the court from ordering his eviction because such 'state action' would have been violative of both the federal and state Constitutions." *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309, 317.

Section 26 had of course amended the State Constitution by the time of the judgment of the trial court in *Prendergast*. Therefore, *Abstract* could be deemed controlling only on the theory that *Shelley* established that the equal protection clause precluded recognition by a State court of rights asserted by a

This extreme interpretation of *Shelley* is unsupported by any decision of this Court and has been suggested by the courts of but one other State [56] in the eighteen years since *Shelley* was decided here. It is demonstrably in conflict with the Pennsylvania Supreme Court in the Second *Girard Trust* Case, in which this Court dismissed the appeal and denied certiorari.[57] It is equally

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party motivated by racial prejudice, however valid the rights might otherwise be.

[56] *State v. Brown*, 55 Del. ...., 195 A. 2d 379.

[57] *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844, app. dism. and cert. den. 357 U.S. 570.

In that case, the Pennsylvania Supreme Court held that the removal of public and the substitution of private trustees in order to carry out the limitation in Stephen Girard's will of a school for poor, white, male orphans was not a violation of the Fourteenth Amendment. Despite substantial governmental involvement, including numerous acts of the State legislature and many city ordinances enacted to enable, encourage and facilitate the effectuation of the will, many years of continuous management by public trustees prior to the substitution of private trustees, and city decrees admitting a will to probate and substituting public for private trustees (see generally dissenting opinions, *In re Girard's Estate*, 386 Pa. 548, 127 A. 2d 287 at 318, and *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 at 854), this Court dismissed the appeal from that decision without any suggestion that the dismissal was not on the merits. (Also, treating the papers as a petition for certiorari, it denied the writ.) 357 U.S. 570.

Inexplicably, the opinions of the Court below do not discuss the Second *Girard Trust* Case or the other wills cases (*e.g.*, *Gordon v. Gordon* (Mass. 1955), 124 N.E. 2d 228, 235 [court decree enforcing provision in a will that an heir's interest would be cut off if he married a person not of the Jewish faith and awarding property to the complainant held not in violation of State law or of the Fourteenth Amendment]; *U. S. National Bank v. Snodgrass* (Or. 1954), 275 P. 2d 860-866.) Those cases cannot lightly be ignored in evaluating the constitutionality of private discrimination in inter vivos transfers. Mere reference to a constitutional "right to *acquire* and *possess* property of every kind" [see R. 19] and casual allusion to the statutory origin of testamentary law in general will not suffice.

The asserted constitutional right to acquire property is balanced by a constitutional right of equal priority to "enjoy, own, and dispose of property." Likewise, the right to *dispose* of property by will is as much the creature of the legislature as is the right to *acquire* property by will. If then discrimination by testamentary

in conflict with decisions of other State and federal courts.[58] It is also irreconcilable with the method of analysis established by this Court in articulating its decisions in the numerous equal protection cases since *Shelley*. Many of those cases, including the sit-in cases of recent years and *Evans v. Newton*[59], could have been handled summarily by citation of *Shelley* if that case in fact held that judicial recognition of rights whose acquisition or assertion was motivated by racial prejudice would — without more — constitute unconstitutional State action.

This Court has never embraced such a simplistic construction of *Shelley*. It has, to the contrary, steadfastly and carefully focused on and defined the critical issue

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act (at least where free from the taint of conspiracy or governmental influence) is beyond the regulatory ambit of Section 1 of the Fourteenth Amendment even though that act can never take effect without both legislative and judicial action—and this much even our opponents have conceded throughout these proceedings—by what alchemy can a person's private and solitary decision not to sell or rent his own real property to a Negro, a decision which can often though not always be given effect without the slightest act of court or other state instrumentality, be transmuted into "state action"? The short answer is that the wills cases, if correct, ineluctably require reversal of the court below in these cases.

Obviously the right to dispose of property does not encompass an obligation of the State to produce a willing buyer. So too, the right to acquire property does not involve any obligation of the State to produce a willing seller. The State *may* prohibit transactions if the motives are ignoble and injurious—but nothing in the Fourteenth Amendment *requires* the State to do so.

[58]See *Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. 2d 110, aff'd, 348 U.S. 880, vacated and cert. dismissed, 349 U.S. 70; *McKibbon v. Michigan Corp. & Sec. Comm'n*, 369 Mich. 69, 119 N.W. 2d 557; *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541, cert. denied, 339 U.S. 981; *Williams v. Howard Johnson's Inc.* (4th Cir.), 323 F. 2d 102, cert. den., 382 U.S. 814, Reh. den., 282 U.S. 933; *Williams v. Howard Johnson's Restaurant* (4th Cir.), 268 F. 2d 845.

[59]382 U.S. 296.

thusly: Can the state fairly be charged with the responsibility for the discrimination in acquiring or asserting the right?[60] If not, the discrimination is private. Surely subsequent judicial recognition of the validity of private rights cannot, standing alone, fairly be held to render the state responsible for the discriminatory acts or motives out of which they arose.[61]

The restrictive covenant cases are distinguishable from the cases here at issue in important respects. There, the Court was asked to compel discrimination by enjoining or burdening a transaction between willing parties, whereas, in the cases below, plaintiffs sought to force themselves on unwilling lessors. The court below wholly ignored this vital distinction and read the equal protection clause far more broadly than did six members of this Court in *Bell v. Maryland*, 378

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[60]As Mr. Justice Harlan expressed it in his concurring opinion in *Peterson v. Greenville*, 373 U.S. 248 at p. 249: "* * * Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights Cases, *supra* (109 U.S. at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."

[61]Such a far-reaching interpretation of *Shelley* has been rejected by all but a few of a host of learned commentators. The principal articles are: Lewis, *The Meaning of State Action* (1960), 60 Col. L. Rev. 1083; Lewis, *The Sit-in Cases: Great Expectations*. The Supreme Court Review (1963), University of Chicago Press, particularly at pp. 114-119; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Van Alstyne and Karst, *State Action*, 14 Stanford L. Rev. 3 (1961) (especially *Case* 17 at p. 50); Kauper, *Civil Liberties and the Constitution*, Chapter IV; pp. 127, 166, University of Michigan Press (1962); Pollak, *Racial Discrimination and Judicial Integrity; A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959); St. Antoine, *Color Blindness but not Myopia; A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 Mich. L. Rev. 993 (1961) (especially pp. 1003-1016); Henkin, *Shelley v. Kraemer; Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963).

U.S. 226. There, Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Douglas, clearly, if by implication, limited the reach of that clause to matters public when he observed at page 313:

> ". . . Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.
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> "We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use. . . ."[62]

Mr. Justice Black, dissenting for himself and Mr. Justice Harlan and Mr. Justice White, made the limitation express when he declared at page 331:

> "This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are

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[62]In a separate concurring opinion for himself and Mr. Justice Goldberg, Mr. Justice Douglas similarly observed at p. 253: "The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy."

willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, *when one party is unwilling, as when the property owner chooses not to sell to a particular person or* not *to admit that person, then, as this Court emphasized in Buchanan, he is entitled to rely on the guarantee of due process of law, that is, 'law of the land', to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use.*" (Emphasis added).

The restrictive covenant cases are further distinguishable in that judicial action forcing willing sellers to discriminate against their wills in the restrictive covenant cases would have had the same characteristics as racial zoning ordinances because of the pervasiveness of such agreements, their duration, their intended applicability to successive non-consenting transferees, and the governmentally imposed sanctions for their breach. The restrictive covenants were held unenforceable for the same reason discriminatory zoning was invalidated, namely, they "annulled the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." *Buchanan v. Warley*, 245 U.S. 60, 81. That rationale is plainly inapplicable to these cases where unwilling lessors are involved. It is likewise inapplicable to Section 26, which has none of the characteristics of a racial zoning ordinance, none of the features of a court-enforced system of restrictive covenants, and leaves strictly to the private decision of each property owner the choice of his buyer or tenant (*supra*, p. 17).

A. Shelley v. Kraemer Goes No Further Than Precluding State Courts From Bringing the Coercive Power of the State to Bear to Coerce or Induce Racial Discrimination by Compelling a Person to so Discriminate or by According More Favorable Treatment to a Racially Discriminatory Decision Than to a Nondiscriminatory One.

Broadly construed, *Shelley* stands for the principle that the states cannot constitutionally bring their judicial power to bear to induce discrimination — *i.e.*, to compel a discriminatory decision by a person who would otherwise make a nondiscriminatory c[illegible] or to punish a nondiscriminatory decision. Such a principle is inapplicable to disputes between the primary parties to a transaction, as Buyer v. Seller, or Lessee v. Lessor. It gives no man a right to compel others to deal with him without racial or other discrimination in private affairs.[63] Nor does it prevent judicial recognition of legal rights which a party might have elected to waive but for his distaste for the color of the other's skin. A debt past due is collectible, a mortgage unpaid is foreclosable, a tenancy at will is terminable even though the action might not have been instituted had the party been dealing with one of his own race or religion or with a member of the same fraternal or social organization or with a close personal friend. What *Shelley* and the equal pro-

[63]See Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 13 (1964): "[T]he Fourteenth Amendment permits each his personal prejudices and guarantees him free speech and press and worship, together with a degree of free economic enterprises, as instruments with which to persuade others to adopt his prejudices; but access to state aid to induce others to conform is barred." The petitioners here are not seeking court aid "to induce others" to practice racial discrimination.

tection clause require is that the State refrain from inducing racial discrimination that would not otherwise occur by bringing its power to bear — on its own motion or at the behest of an outsider to the transaction— to deprive a man, because of his race, of a bargain or benefit another is willing to confer upon him, or to punish a man for making a non-discriminatory decision.[64]

B. Judicial Recognition and Enforcement of Legal Rights Should Not, Even in Matters Involving Racial Discrimination, Turn Upon Such Superficial Criteria as the Position of the Parties or Their Election Among Available Types of Pleadings.

By invoking *Shelley* in support of its decision against the cross-complaining lessor in *Prendergast* while at the same time affirming the judgment in favor of the demurring landlord in *Hill v. Miller*, 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P. 2d 33, App. 15, the California Supreme Court appears to have attributed substantial, possibly dispositive, significance to the defendant's election among available procedural formalities. That it did so is further indicated by the "affirmative relief" language of the *Prendergast* trial court [R. 74], whose reasons for decision were adopted by the

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[64]Still further limitations may be required in circumstances where other valued interests are involved. For example, absent state law to the contrary, a trustee or executor administering a trust or estate with discriminatory provisions, though in a sense an "outsider to the transaction", should probably not only be free to follow those provisions if he chooses; he probably should be subject to judicial coercion to follow them or at least subject to removal by judicial action if necessary, if he refuses. See Wechsler, "The Nature of Judicial Reasoning, Part II, C, p. 295. *Law and Philosophy*, N.Y. Univ. Press. 1964.

California Supreme Court [R. 83-84]. Still further indication is given by the failure of the court below to rely upon its *Shelley* theory as an independent ground of decision in *Mulkey v. Reitman* [R. 14]. Indeed in *Mulkey* (an appeal from a judgment entered on defendant's motion for judgment on the pleadings), the California Supreme Court observed before reaching the basis for its decision:

> "*Shelley,* and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the *Shelley* and the *Abstract* [*Development Co. v. Hutchinson,* 204 Cal. Rptr. 309], cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate. The court is not asked to enforce a covenant nor to eject a tenant, but only to render judgment denying the relief sought in accordance with the law of the state. * * *" [R. 22-23].

The court below intimates in its *Mulkey* opinion that the distinction had no significance, but in *Prendergast* [R. 83-84] and *Hill v. Miller* [R. 18] it held the distinction was dispositive. Professors Horowitz and Karst characterize these results:

> "* * * In both cases the plaintiffs sought to restrain evictions, at the end of their tenancies, alleging that the defendant landlords sought to evict

solely because the plaintiffs were Negroes. In *Prendergast* the landlord cross-complained for a declaratory judgment that he was entitled to possession of the premises. * * * In *Hill* the defendant did not cross-complain for relief; he merely demurred to the plaintiff's complaint for an injunction to restrain the eviction. And the court said that plaintiff's reliance upon *Abstract* is misplaced. In that case it was held that to make available to a discriminating landlord the aid and processes of a court in effecting a discrimination would involve the state in action prohibited by the Fourteenth Amendment.'

"In both cases the landlord contended that he was permitted under California law to use race as a standard in determining to whom he would rent his property. With respect to the argument based on *Abstract,* the court responded that if the landlord wished to rely on that principle of California law the courts (a) could constitutionally apply the principle in his favor if he defended a suit brought by the tenant, but (b) could not constitutionally apply the principle in the landlord's favor if he were seeking judicial relief, as was the plaintiff in *Abstract* and the cross-complaining defendant in *Prendergast.* The court apparently concluded that there was a constitutional distinction in the degree of state involvement in private acts of racial discrimination between the situation where a plaintiff landlord is awarded a judgment that he is entitled to the premises and the situation where a defendant landlord is awarded a judgment that the tenant is not entitled to the premises—a distinction which

the court in the principal decision, *Mulkey,* stated to be without significance. The constitutional issue, of course, is the validity of the principle of state law permitting private acts of racial discrimination in housing; the approach of the court to the *Abstract* issue in *Prendergast* and *Hill* misses the point." Horowitz and Karst, "The Proposition Fourteen Cases: Justice in Search of a Justification," 14 U.C.L.A., L. Rev. 37, 44-45, n. 26.

We submit that Constitutional principles ought not to stand or fall on such procedural niceties as a defendant's election between a demurrer and a cross-complaint seeking a declaration that the plaintiff does not have the right which he asserts and upon which he bases his claim for relief. *Shelley v. Kraemer* does not require such a result. An enlightened concern for the substance of Constitutional rights can hardly tolerate it.

C. Because California Has by Statute Outlawed All Means by Which a Landlord May Recover Possession of Property Wrongfully Occupied by a Tenant Except an Action in Unlawful Detainer, Petitioner Snyder Will Be Deprived of His Property Without Due Process and the Equal Protection of the Unlawful Detainer Law if the Courts Refuse to Recognize and Enforce His Termination of the Month-to-Month Tenancy of the Prendergasts.

In California, a lessor of real property with the right to possession can lawfully recover possession from a tenant in actual though wrongful occupation only by an action in unlawful detainer.[65] Without the consent

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[65]California Code of Civil Procedure, Section 1161, *et seq.*

of the person in wrongful occupation, self-help is punishable as forcible entry and/or detainer.[66] If California courts refuse to recognize petitioner's termination of tenancies-at-will granted on their property, Mr. Snyder will be deprived of the only lawful means of recovering possession of his property from the wrongful occupation of plaintiffs.

If landlords are thus to be deprived of effective access to summary proceedings under the unlawful detainer laws whenever a tenant alleges that the landlord is proceeding discriminatorily, tenants could wrongfully retain possession of premises throughout the course of protracted litigation merely by asserting in a responsive pleading that the landlord was discriminatory. (The rationale of the court below would not seem be confined to racial discrimination but should extend to any arbitrary conduct forbidden the States by the Fourteenth Amendment). That the landlord might ultimately prevail would be of little solace. He would have lost the use of, and perhaps also the income from his property throughout the pendency of the litigation, perhaps as much as five years or more. That such a state of the law would in practical terms do much to discourage the rental of property to Negroes can hardly be doubted.

If Mr. Snyder is denied the only remedy the law permits to recover his property, the result would be the elimination without his consent of the only provision of the oral month-to-month tenancy he granted which distinguishes it from a tenancy for a term. The result would be comparable to a reverse decree of specific performance in favor of the tenants of a contract they did

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[66]Code of Civil Procedure, §§ 1159 and 1160, *et seq.*

not have, the abrogation of a tenancy-at-will to which the parties had agreed, and the imposition upon landlords without benefit of any statute so providing of the heavy burden of disproving a racial motive when dealing with Negro tenants.[67] Mr. Snyder would be deprived of his property in a very real and tangible sense without any legislative justification and without due process of law. He would be denied the equal protection of the California unlawful detainer laws. *Buchanan v. Warley*, 245 U.S. 60; *Bell v. Maryland*, 378 U.S. 226, 318 (dissenting opinion).

D. To Adopt California's Expansive Construction of Shelley v. Kraemer Would Compel This Court to Resolve in an Inevitably Fragmentary Manner a Host of Constitutional and Psychiatric Problems in a Multitude of Otherwise Routine Private Disputes and Thereby Impose an Insuperable Burden Upon This Court as an Institution.

If the California Supreme Court interpretation of *Shelley* is not reversed, an issue of Constitutional proportions and psychiatric overtones may be presented by virtually every dispute between members of different racial, religious or political groups. The inevitable result will be the elimination of stability in a myriad of economic transactions, a shattering of a portion of

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[67] See *e.g., Rice v. Sioux City Memorial Cemetery*, 245 Iowa 147, 60 N.W. 2d 110, 115, aff'd, 348 U.S. 880, vac. and cert. dismissed, 349 U.S. 70; *Segre v. Ring*, 103 N.H. 278, 170 A. 2d 265, 266 where the court said regarding an unequivocal restriction against assignment in a lease: "The Court will not rewrite the agreement to compel the [lessor] . . . to permit the assignment or to give their reasons for not doing so." See also, 32 Am. Jur., Landlord and Tenant, §343.

the law of wills and property,[68] an inestimable increase in the costs of collection on defaulted obligations, a consequent reluctance to deal with members of minority groups, and an enormously expanded responsibility and burden on this Court quite out of keeping with the limited role of both this Court and the Federal Government under the Fourteenth Amendment. In short, the Constitutional doctrine adopted below would require this Court on a case by case basis to determine, without benefit of either the investigative resources of a legislature or any means of measuring the temper of the people, whether private conduct in an infinite variety of contexts should be subjected to the standards imposed upon the States by the Fourteenth Amendment.

We submit that *Shelley* was not intended to and does not impose so onerous a burden on this Court. Nor is the burden one that this Court should willingly shoulder. As former Solicitor General Archibald Cox argued in the *amicus* brief filed on behalf of the United States in the 1964 sit-in cases:

> ". . . there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States—but only this Court—could exercise the final judgment."

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[68]Professor Herbert Wechsler in "The Nature of Judicial Reasoning," Part III, C, p. 295 of *Law and Philosophy*, N.Y. Univ. Press, 1964: ". . . But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the state would not be free to make on the initiative of officials. * * *"

"The preservation of a free and pluralistic society would seem to require substantial freedom for private choice, in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.

"Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keeping with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

* * *

"We read *Shelley v. Kraemer* as an instance of this moderate view. * * *"[69]

For all of these reasons we urge this Court to declare that the Constitution does not oblige every State court to close its doors to all litigants whose motives are tarnished by their dislike for the race, religion, or political views of their adversaries.

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[69]Supplemental Brief of the United States as Amicus Curiae (in *Griffin v. Maryland*, 378 U.S. 130; *Barr v. Columbia*, 378 U.S. 146, *Bowie v. Columbia*, 378 U.S. 347; *Bell v. Maryland*, 378 U.S. 226, and *Robinson v. Florida*, 378 U.S. 153) at pages 87-88.

Conclusion.

For the reasons stated *Mulkey v. Reitman* should be remanded to the court below with instructions to affirm the judgment of the trial court dismissing the complaint [R. 13]; and *Prendergast v. Snyder,* should be remanded with instructions to reverse the judgment of the trial court [R. 79] and direct it to grant the relief prayed for by Mr. Snyder in his cross-complaint [R. 63].

Respectfully submitted,

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APPENDIX.

Article I, Section 26, California Constitution.

Text.

Sales and Rentals of Residential Real Property

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstances, is held invalid, the remainder of the Article, including the ap-

plication of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable. [*New section adopted November 3, 1964*]

Ballot Arguments.

SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. Initiative Constitutional Amendment. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels and similar public places.

Analysis by the Legislative Counsel

This measure would add Section 26 to Article I of the California Constitution. It would prohibit the State and its subdivisions and agencies from directly or indirectly denying, limiting, or abridging the right of any "person" to decline to sell, lease, or rent residential "real property" to such person or persons as he, in his absolute discretion, chooses.

By definitions contained in the measure, "persons" would include individuals, partnerships, corporations and other legal entities, and their agents or representatives, but would not include the State or any of its subdivisions with respect to the sale, lease, or rental of property

owned by it. "Real property" would mean any residential realty, regardless of how obtained or financed and regardless of whether such realty consists of a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

The measure would not apply to the obtaining of property by eminent domain, nor to the renting or providing of any transient lodging accommodations by a hotel, motel, or other similar public place engaged in furnishing lodging to transient guests.

Argument in Favor of Proposition No. 14

Your "Yes" vote on this constitutional amendment will guarantee the right of all home apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.

Most owners of such property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

The Rumford Act establishes a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

Your "Yes" vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another.

Under the Rumford Act, any person refused by a property owner may charge discrimination. The owner

must defend himself, not because he refused, but for his reason for refusing. He must defend himself for alleged unlawful thoughts.

A politically appointed commission (Fair Employment Practices Commission) becomes investigator, prosecutor, jury and judge. It may "obtain . . . and utilize the services of all governmental departments and agencies" against you. It allows hearsay and opinion evidence.

If you cannot prove yourself innocent, you can be forced to accept your accuser as buyer or tenant or pay him up to $500 "damages."

You may appeal to a court, but the judge only reviews the FEPC record. If you don't abide by the decision, you may be jailed for contempt. You are never allowed a jury trial.

If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?

Your "Yes" vote will prevent such tyranny. It will restore to the home or apartment owner, whatever his skin color, religion, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private par-

ties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation.

Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.

Your "Yes" vote will end such interference. It will be a vote for freedom.

Submitted by:

L. H. WILSON
Fresno, California
Chairman, Committee
for Home Protection

JACK SCHRADE
State Senator
San Diego County

ROBERT L. SNELL
Oakland, California
President, California
Apartment Owners
Association

Argument Against Proposition No. 14

Leaders of every religious faith urge a "NO" vote on Proposition 14.

Leaders of both the Republican and Democratic parties urge a "NO" vote on Proposition 14.

Business, labor and civic leaders urge a "NO" vote on Proposition 14.

Why such overwhelming opposition? Because Proposition 14 would write hate and bigotry into the Constitution. It could take away your right to buy or rent the home of your choice.

The evidence is clear:

1. *Proposition 14 is a deception.* It does not give you a chance to vote for or against California's Fair Housing Law. Instead, it would radically change our Constitution by destroying all existing fair housing laws. But more than that, it would forever forbid your elected officials of the state, cities and counties from any future action in this field. It would also threaten all other laws protecting the value of our properties.

2. *Proposition 14 says one thing but means another.* Its real purpose—to deny millions of Californians the right to buy a home—is deliberately hidden in its tricky language. Its wording is so sweeping it could result in persons of any group being denied the right to own property which they could afford.

3. *Proposition 14 is not legally sound.* California's Supreme Court already has said there are "grave" doubts as to its constitutionality. It destroys basic rights of indivlduals and thus is in violation of the U.S. Constitution.

4. *Proposition 14 is misleading.* California already has a fair and moderate housing law similar to those in effect in 10 other states. In five years the Fair Employment Practice Commission, which administers this law, has dealt with over 3,500 cases in both employment and housing. *All but four cases were either dismissed or settled in the calm give-and-take of conciliation.*

5. *Proposition 14 is a threat.* It would strike a damaging blow to California's economy through loss of $276,000,000 in federal redevelopment and other construction funds. Thousands of Californians could be thrown out of work.

6. *Proposition 14 is immoral.* It would legalize and incite bigotry. At a time when our nation is moving ahead on civil rights, it proposes to convert California into another Mississippi or Alabama and to create an atmosphere for violence and hate.

For generations Californians have fought *for* a tolerant society and *against* the extremist forces of the ultra-right who actively are behind Proposition 14.

Now a selfish, mistaken group would restrict free trade in real estate in California—a powerful lobby seeking special immunity from the law for its own private purposes is asking you to vote hatred and bigotry into our State Constitution.

Do not be deceived. Join the leaders of our churches, our political parties and business and labor in voting "NO" on Proposition 14. Before you vote study! Learn why you should join us!!

REVEREND
DR. MYRON C. COLE
President, Council of Churches
in Southern California

MOST REVEREND
HUGH A. DONOHOE
Bishop, Catholic Diocese of
Stockton

STANLEY MOSK
Attorney General of California

Material Portions of Section 1, Article IV, California Constitution.

Legislative Power Vested in Senate and Assembly.

SECTION 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

California Civil Code Sections 51, 52 (California Civil Rights Law, as Amended in 1959 — the Unruh Act).

California Civil Code §51

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All ~~citizens~~ *persons** within the jurisdiction of this ~~state~~ *State are free and equal, and no matter what their race, color, religion, ancestry or national origin* are entitled to the full and equal accommodations, advantages, facilities, ~~and~~ privileges, of ~~inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bathhouses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable to all citizens.~~ *or services in all business establishments of every kind whatsoever.*

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons* of every color, race, religion, ancestry or national origin.*

*1961 amendment, deleted "citizens".

California Civil Code §52

Whoever denies ~~to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty one of this code,~~ or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, ~~or~~ race, *religion, ancestry or national origin, contrary to the provisions of Section 51 of this Code,* ~~or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose,~~ *is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this Code.*

[California Civil Code §§ 51-52 as amended in 1959.]

California Health and Safety Code Section 35,700 et seq. (Material Portions of California "Fair Housing" Law of 1963—the Rumford Act).

California Health & Safety Code §§ 35700-43—This Act (§35,720) makes it unlawful:

"1. *Owners of publicly assisted multiple dwellings.* For the owner of any publicly assisted housing accommodation which is in, or to be used for, a multiple dwelling, with knowledge of such assistance, to refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodation because of the race, color, religion, national origin, or ancestry of such person or persons.

2. For the owner of any publicly assisted housing accommodation which is in, or to be used for, a multiple dwelling, with knowledge of such assistance, to discriminate against any person because of the race, color, religion, national origin or ancestry of such person in the terms, conditions or privileges of any publicly assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

3. For any owner of any publicly assisted housing accommodation which is in, or to be used for, a multiple dwelling, with knowledge of such assistance, to make or to cause to be made any written or oral inquiry concerning the race, color, religion, national origin or ancestry of a person seeking to purchase, rent or lease any publicly assisted housing accommodation for the purpose of violating any of the provisions of this part.

4. *Owner of publicly assisted single dwelling.* For the owner of any publicly assisted housing accommodation

which is a single family dwelling occupied by the owner, with knowledge of such assistance, to commit any of the acts prohibited by subdivisions 1, 2, and 3.

5. *Owner of dwelling containing more than four units.* For the owner of any dwelling, other than a dwelling containing not more than four units, to commit any of the acts prohibited by subdivisions 1, 2, and 3.

6. *Persons subject to CC § 51.* For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, and to transactions relating to sales, rentals, leases; or acquisition of housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, national origin, or ancestry with reference thereto.

7. *Financial institutions.* For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, national origin or ancestry of such person or persons, or of prospective occupants or tenants, in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance.

8. *Aiding, abetting, etc.* For any person to aid, abet, incite, compel or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so."

Other California Antidiscrimination Statutes.

1. Civil Code §69 and Health & Safety Code §10350—Applicants for a marriage license shall not be required to state for any purpose their race.

2. Civil Code §782—Any provision in deed of real property proporting to restrict right to sell, etc. to one race is void.

3. Education Code §8451—No teacher nor entertainments around a school shall reflect in any way upon citizens of the United States because of their race.

4. Education Code §8452—No textbooks, etc. which are adopted shall reflect upon citizens of the United States because of their race.

5. Education Code §13274—Reflects state's policy against persons charged with hiring teachers refusing or failing to do so for reasons of the race of the applicant.

6. Education Code §13732—No questions concerning race shall be asked of any applicant whose name has been certified for appointment for classified positions.

7. Election Code §223—No County Clerk can refuse to deputize any person to register voters because of that person's race.

8. Government Code §19702—No person shall be discriminated against for Civil Service appointment because of race, color, national origin, etc.

9. Government Code §19704—Unlawful to permit any notation to be made on an application or examination for Civil Service indicating the race of any person.

10. Government Code §54091—Any governmental entity which owns, operates or controls beaches shall allow use of them by all persons regardless of color.

11. Government Code §§50260-62—Authorizes counties over 2,000,000 population to establish a commission to develop plans for preserving peace among citizens of all races. Authorizes counties and cities to expend public funds to promote positive human relations.

12. Government Code §8400—Prohibits inclusion of any question relative to an applicant's race to be filled in and submitted by applicant to any board, commission, agents, etc., of this state.

13. Health & Safety Code §33039—State recognizes one of causes of slums is racial discrimination in seeking housing; public policy that this factor will be taken into consideration in any redevelopment program.

14. Health & Safety Code §33050—Policy of State that is undertaking community redevelopment there will be no discrimination because of race.

15. Health & Safety Code §33435—Agencies shall obligate lessees and purchasers of real property acquired in urban renewal to refrain from restricting rental, sales or lease on basis of race. All such deeds or leases shall be submitted to the agency and shall include non-discrimination clauses.

16. Health & Safety Code §33436—Contains the anti-discrimination clauses required to be in the leases, etc.

17. Insurance Code §§11628-29—Insurer cannot refuse to accept application or cancel insurance under conditions less favorable to insured except for reasons applicable to all races, nor charge one race a higher premium.

18. Labor Code §1735—No discrimination made in employment of persons upon public works because of race; contractor violating this is subject to penalties.

19. Labor Code §1777.6—Unlawful for employer or labor union to refuse to accept otherwise qualified employees as indentured apprentices on any public work solely on basis of race.

20. Labor Code §§1410-32—Fair Employment Practice Act. §1411 states that it is the public policy of this state to protect the rights of all persons to seek employment without discrimination.

The Act applies to employers of five or more persons, labor organizations, employment agencies, and to the State or any of its political subdivisions and cities. The Act does not cover social, fraternal, charitable, educational, or religious associations, non-profit corporations, or employers of agricultural and domestic workers. The Act prohibits an employer to refuse to hire or to discharge from employment any persons because of race, or to discriminate in terms of compensation, etc. on such basis. An employer cannot use an application form or make inquiry of the prospective employee which directly or indirectly expresses a limitation based on race. The bill establishes the Fair Employment Practice Commission to administer the Act.

21. Welfare & Institutions Code §§2380-86—State will not approve local plans to promote community activities among old people unless it is available to all older citizens regardless of race.

Majority Opinion of the California Supreme Court.

[Sac. No. 7657. In Bank. June 8, 1966.]

CLIFTON HILL, Plaintiff and Appellant, v. CRAWFORD MILLER, Defendant and Respondent.

[On rehearing after judgment reversed (64 A.C. 598, 50 Cal.Rptr. 908). Judgment of superior court affirmed.]

APPEAL from a judgment of the Superior Court of Sacramento County. William M. Gallagher, Judge. Affirmed.

Action to restrain a landlord from evicting a Negro tenant solely because of his race. Judgment of dismissal after demurrer was sustained without leave to amend affirmed.

Colley & McGhee, Nathaniel S. Colley, Milton L. McGhee, Stanley Malone and Clarence B. Canson for Plaintiff and Appellant.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Richard A. Bancroft, Jack Greenberg, Joseph B. Robison, Sol Rabkin, Robert M. O'Neil, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr. Howard Nemerovski, John G. Clancy, Ephraim Margolin, George T. Altman and Ray R. McCombs as Amici Curiae on behalf of Plaintiff and Appellant.

Harry A. Ackley, Robert J. Cook and John M. Beede for Defendant and Respondent.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., and Charles S. Battles, Jr., as Amici Curiae on behalf of Defendant and Respondent.

PEEK, J.—Plaintiff tenant appeals from a judgment for defendant landlord entered upon the sustaining of a demurrer without leave to amend in an action for an injunction to restrain defendant from evicting plaintiff, a Negro, solely because of his race.

[1] It appears from the complaint and is deemed admitted by the demurrer that plaintiff occupies, as a tenant, residential property owned by defendant; that defendant caused to be served upon plaintiff a notice to quit possession and terminate the tenancy; that the notice was given only for the reason that defendant plans to exclude Negroes from the rental of residential real property owned by defendant; that defendant intends to follow the notice with an action for unlawful detainer in the appropriate municipal court; that he asserts he is entitled to discriminate in the rental of his property in reliance on article I, section 26, of the California Constitution;[1] that plaintiff has a right not to be subjected to such discrimination by virtue of the Fourteenth Amendment to the federal Constitution, and that he has no adequate remedy at law by which to preserve his right.

Defendant demurred to the complaint upon the ground that it failed to state sufficient facts to consti-

---

[1]The operative portion of article I, section 26, of the California Constitution provides:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

tute a cause of action. Arguments on the demurrer were heard together with arguments on plaintiff's motion for a preliminary injunction and the merits of the constitutionality of article I, section 26. The demurrer was sustained without leave to amend, and thereafter the instant judgment was entered.

We have concluded in *Mulkey v. Reitman, ante,* p. 529 [50 Cal.Rptr. 881, 413 P.2d 825], that article I, section 26, is an unconstitutional infringement upon the equal protection clause of the Fourteenth Amendment, and for that reason defendant is not entitled to rely upon it as giving him a right to discriminate against plaintiff in the rental of defendant's property. It does not follow from such holding, however, that plaintiff stated a cause of action. To withstand defendant's demurrer he must allege facts which entitle him to relief as a matter of law. This he has failed to do.

The facts which plaintiff has alleged show only that defendant has discriminated and intends to further discriminate against defendant and Negroes generally in the rental of defendant's residential property. The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here. (*Mulkey v. Reitman, ante,* pp. 529, 536 [50 Cal. Rptr. 881, 413 P.2d 825].)

[2] Although the state, by action of the Legislature or the People, may make such private acts of discrimination unlawful, it has not done so. [3] Section 51 of the Civil Code, commonly known as the Unruh Civil Rights Act, prohibits discrimination only where it occurs in "business establishments of every kind whatsoever." (See *Lee v. O'Hara* (1962) 57 Cal.2d 476

[20 Cal.Rptr. 617, 370 P.2d 321]; *Burks v. Poppy Constr. Co.* (1962) 57 Cal.2d 463 [20 Cal.Rptr. 609, 370 P.2d 313].) [4] The Rumford Fair Housing Act (Health & Saf. Code, §§ 35700-35744) prohibits discrimination only in the sale or rental of public assisted housing accommodations and in any private dwelling containing more than four units. (Health & Saf. Code, §§ 35710, 35720.) Plaintiff has failed to allege facts which would bring him within either the Unruh or Rumford acts, or any other statutory provision. Not only has he failed to state a cause of action, but there is nothing in the record to suggest that he could amend his complaint to so state a cause of action under any statutory provision.

Plaintiff is further unable to plead facts which would afford him relief under any decisional law. His reliance in this connection upon *Abstract Investment Co. v. Hutchinson,* 204 Cal.App.2d 242 [22 Cal.Rptr. 309], is misplaced. In that case it was held that to make available to a discriminating landlord the aid and processes of a court in effecting a discrimination would involve the state in action prohibited by the Fourteenth Amendment.

For the foregoing reasons the judgment is affirmed.

Traynor, C. J., Peters, J., Tobriner, J., and Burke, J., concurred.

WHITE, J.*—For the reasons stated in my dissenting opinion in *Mulkey v. Reitman, ante,* p. 545 [50 Cal. Rptr. 881, 413 P.2d 825], I concur in the judgment.

McComb, J., concurred.

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST, and CAROLA EVA PRENDERGAST,
Respondents.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST, and CAROLA EVA PRENDERGAST,
Respondents.

BRIEF FOR RESPONDENTS.

Prefatory Note.

The instant case does not involve the efforts of the owner of a private home to choose the person to whom he will sell or lease. [*Cf., Br.*, 13-14, 23.[1]] What is involved here is racial discrimination by owners of multiple-dwelling buildings who are engaged in the business of renting, to the public, apartment units in those buildings. [See, pp. 7, 9, *infra.*] Only two of the seven cases that were heard together below are here.[2]

[1]The "Brief for Petitioners" herein is referred to by us merely as "*Br.*"

The California constitutional amendment here involved [*Br.* 3] is referred to in this brief as "section 26."

[2]Of the five cases that are not here only one [*Hill v. Miller*, 64 Cal. 2d 757, 413 P. 2d 852, 51 Cal. Rptr. 689] involved a private-home owner [see *Br.*, 8-9]; and in its judgment below went in favor of the owner.

Petitioners assert that section 26 "forbids governmental restrictions upon the privilege of residential owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance or whatever . . ." [*Br.*, 17-18.] That description of the section is singularly incomplete, and irrelevant at bar. The fact is that no one in this case claims to have been denied an equal opportunity to get a home, because he or she was of the wrong sex or age, unseemly in appearance, kept pets, or had followed the Biblical injunction [Gen. 35:11] to be fruitful and multiply. What *is* claimed is that petitioners, being in the business of renting residential accommodations, denied respondents an equal opportunity to get a home, simply and solely because they are Negroes. This case involves racial discrimination, and the unconstitutionality of it when the State involves itself in it by making it a constitutional right, and by otherwise encouraging and assisting in its consummation.

The fact, as petitioners several times mention [*Br.*, 6, 20, 23, 34], that section 26 was added to the state constitution by the direct vote of the people, is quite beside the point. The people acting directly may no more violate the constitution of the United States than may their legislative, judicial or executive representatives. [*Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-737. Also, see: *McCulloch v. Maryland*, 4 Wheat. 316, 405-406.]

Jurisdiction.

This Court is without jurisdiction of *Reitman v. Mulkey,* one of the two cases brought here pursuant to a single petition for certiorari. The judgment in that case is one of reversal; it leaves the case remanded for trial on the merits just as though there had never been a judgment. [*Central Sav. Bank v. Lake,* 201 Cal. 438, 443, 257 Pac. 521, 523.] It is not, therefore, a final judgment. [*Southern Pacific Co. v. Gileo,* 351 U.S. 493, 495-496; *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 381-382; *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547.] The want of finality is fatal to this Court's jurisdiction. [28 U.S. Code, §1257(3); *Market Street R. Co. v. Railroad Com.,* 324 U.S. 548, 551.]

Constitutional Provisions Involved.

The single State constitutional provision, to the unconstitutionality of which under the Federal constitution, the decision below is directed, is section 26 of article I of the Constitution of California. It may be found in the official edition at California Statutes, 1965, vol. 1, p. A-15. It is given here completely, as petitioners omit a part of it.

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

" 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

" 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable."

Restatement of Questions Involved.

1. Does a state constitutional provision, that makes it a secured and absolute right for an owner of residential property to refuse to sell, lease or rent the property because of the proposed acquirer's race, color or religion, so authorize, approve or encourage racial discrimination as to involve the State in the owners' racially discriminatory refusal, and thereby render the provision obnoxious to the Equal Protection Clause of the Constitution of the United States?

2. Is such state constitutional provision invalid under the Supremacy Clause, because it is inconsistent with the federal Civil Rights Acts guaranteeing to all persons the same right to make contracts and to purchase, hold and lease real property as is enjoyed by white citizens?

3. Does the State violate the Due Process Clause of the Fourteenth Amendment when it effectively disenables itself and all its agencies, subdivisions and agents from rendering, and denies, any relief or remedy for irreparable suffered by those who, solely because they are Negroes, are refused an equal opportunity to acquire, rent or lease residential property?

4. Does the State deny equal protection of the laws when, through the coercive processes of its courts, it enforces an eviction of a negro tenant from residential accommodations rented to him at will, the sole ground of the eviction being the tenant's race?

Statement of the Case.

Petitioners "Statement of the Cases" [*Br.*, pp. 5-9] is not complete. More of the proceedings below is needed to show how and why the question here involved arose. More, too, is needed of the facts concerning racial discrimination and *de facto* residential segregation in California, as well as of the facts relating to the circumstances in which the state constitutional provision here involved was adopted and in which it will operate.[3] That more follows.

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[3]The State Supreme Court, in order to ascertain the "immediate objective" of section 26, and to place it in "its historical context and the conditions existing prior to its enacment," noticed and considered the relevant facts. [R. 17-19.] In California, at the time the instant causes were pending in the State court, historical and legislative facts of this sort, and facts of common knowledge, were (they still are, but under different statutory provisions, see *Cal. Evidence Code*, secs. 451, 452), properly the subjects of judicial notice. [*Cal. Code of Civil Procedure* (1965), sec. 1875, subds. 3, 8; *Ventura County Harbor District v. Board of Supervisors*, 211 Cal. 271, 277, 295 Pac. 6, 8; *People v. Torres*, 56 Cal. 2d 864, 866, 366 P. 2d 823, 825, 17 Cal. Rptr. 496, 497; *Wilson v. Loew's Inc.*, 142 Cal. App. 2d 183, 188, 298 P. 2d 152, 156, and cases there cited in note 3.] This Court has the same power of judicial notice as the court whose judgment is under review. [*Hanley v. Donoghue*, 116 U.S. 1, 6; *Chicago and Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622-623; *Adams v. Saenger*, 303 U.S. 59, 63; *Renaud v. Abbott*, 116 U.S. 277, 285.] The California Supreme Court's power of judicial notice was not dependent, and, therefore, neither is this Court's, upon exercise of the power in the lower court. It may be exercised by the reviewing court even though the lower court failed or refused to do so. [*Rogers v. Cady*, 104 Cal. 288, 290, 38 Pac. 81; *People v. Stralla*, 14 Cal. 2d 617, 620, 96 P. 2d 941, 942; *People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883.]

The power should be exercised in the instant case, for the noticed facts serve to define the discriminatory purpose that section 26 was avowedly designed to serve; and, also, to show clearly the intended and natural operation and effect of the section in the conditions in which it does and will operate in California. [See, pp. 11-18, *infra*.]

1. *Mulkey v. Reitman.*[4] Lincoln W. Mulkey and Dorothy J. Mulkey are Negroes, husband and wife, and citizens of the United States. [R. 2] They are two of the respondents here. The petitioner Neil Reitman is the owner of an apartment building in Santa Ana, California (in the County of Orange, of which county Mr. and Mrs. Mulkey are residents); the other petitioners are the managers of that building; and all petitioners are in the business of renting apartments to members of the public. [R. 2-3.] In May, 1963, one or more apartments in that building were unoccupied and were being offered by petitioners to the public for rent. [R. 3.] Mr. and Mrs. Mulkey, at that time, offered to rent one of the apartments, but the petitioners refused to rent any apartment to them, solely because they were Negroes. [R. 3.] As a consequence of that refusal, Mr. and Mrs. Mulkey were unable to rent a suitable place to live, suffered "humility [sic]" (but meaning "humiliation"), disappointment and pain and suffering, to their general damage in the sum of $50,000.00. [R. 3.]

Petitioners will continue to refuse to rent to Mr. and Mrs. Mulkey or to other Negroes, solely because of their race, unless enjoined by the court. The discrimination practiced by petitioners is also practiced by other real estate brokers and home and apartment landlords and owners in Orange County, and throughout California. [R. 4.] Mr. and Mrs. Mulkey, therefore, brought the action, as a clsss action in behalf of all persons discriminated against because of their race or color. [R.

[4]The case was decided in the trial court on the pleadings. [R. 10-13.] The facts summarized are those alleged in the Mulkeys' complaint, and which, for purposes of the proceedings below, had to be and were taken as true. [*Davis v. Santa Ana*, 108 Cal. App. 2d 669, 685, 239 P. 2d 656, 665.]

2, 4.] They prayed for monetary damages and an injunction against the discrimination alleged. [R. 4-5.]

This action was commenced on May 29, 1963 [R. 2], which was before section 26 was adopted. The Unruh Civil Rights Act [*Cal. Civil Code,* secs. 51, 52 (Cal. Stats., 1959, c. 1866, p. 4424; Cal. Stats. 1961, c. 1187, p. 2920)] was in full force and effect at that time. The Mulkey action was designed, *i.a.,* to recover the general and statutory damages provided for in that Act.[5] [R. 3, 4-5.] Upon adoption of section 26, petitioners moved in the trial court for, what was in a legal effect, a judgment on the pleadings, on the sole ground that section 26 "rendered Civil Code Sections 51 and 52 upon which this action is based null and void." [R. 10.] The motion was granted on that ground and a judgment that the Mulkeys take nothing was entered. [R.

[5]So far as material here, the Unruh Civil Rights Act provided (and still provides):

§51. "All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

§52. "Whoever denies . . . or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 . . . is liable . . . for the actual damages and two hundred fifty dollars ($250.00) in addition thereto, suffered by any person denied the rights provided in section 51 . . ."

The Act has been construed by the State courts to apply to persons in the business of selling real estate, whether as owner or broker [*Lee v. O'Hara,* 57 Cal. 2d 476, 478, 370 P. 2d 321, 322, 20 Cal. Rptr. 617, 618; *Burks v. Poppy Const. Co.,* 57 Cal. 2d 463, 468-469, 370 P. 2d 313, 315-316, 20 Cal. Rptr. 609, 611-612; *Don Wilson Builders v. Superior Court,* 220 Cal. App. 2d 77, 82, 33 Cal. Rptr. 621, 624; *Crowell v. Isaacs,* 235 Cal. App. 2d 755, 757, 45 Cal. Rptr. 566, 567]; and to persons renting units or apartments in a multiple-unit dwelling. [*Swann v. Burkett,* 209 Cal. App. 2d 685, 26 Cal. Rptr. 286.]

12-13.] On appeal by Mr. and Mrs. Mulkey to the State Supreme Court [R. 13-14] the judgment was reversed [R. 14, 31], on the ground that section 26 was an unconstitutional infringement of the Fourteenth Amendment. [R. 17, 31, 81, 83-84.]

2. *Prendergast v. Snyder.*[6] Respondent Wilfred J. Prendergast, a Negro, and Carola Eva Prendergast, a Caucasian, are husband and wife. [R. 51.] Petitioner Clarence Snyder is the owner of a seven-unit apartment building in Los Angeles, which he rents to tenants. [R. 51.] On July 13, 1964, he rented it, through a realtor, to Mrs. Prendergast. The realtor was then advised that Mrs. Prendergast's husband was working in San Francisco, but would join her to live in the rented apartment as soon as he was transferred to Los Angeles. [R. 51-52.] Neither petitioner Snyder nor the realtor knew at that time that the husband, respondent Wilfred J. Prendergast, was a Negro. In October, 1964, Mr. Prendergast stayed with his wife at the apartment, at which time the realtor saw he was a Negro. The following month he moved into the apartment and there lived with his wife. [R. 52.] Within the month, petitioner served a notice to quit upon the Prendergasts. The sole reason for that notice was that respondent Wilfred J. Prendergast is a Negro. [R. 53.] It was not sooner served because of the requirements of the Unruh Civil Rights Act. [See fn. 5, p. 8, *supra*]. It was, however, served promptly after section 26 was adopted. [R. 53-54.] Unless restrained, petitioner Snyder will cause the Prendergasts to be evicted, for which they have no adequate remedy at law; and he will also refuse to rent to other Negroes. [R. 54.]

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[6]Like *Mulkey*, this case also was decided on the pleadings. [R. 79-80.] The facts as stated are those alleged.

The Prendergasts sued to restrain the threatened eviction. [R. 51, 54-55.] Petitioner Snyder cross-complained against the Prendergasts to have it adjudicated and declared that the Prendergast tenancy had been lawfully terminated and that he has the right to have a court recognize and enforce that termination, even if his sole reason for it and for his seeking judicial recognition of it is the race of Mr. Prendergast. [R. 63, 65-66.] He alleged in the cross-complaint that it was his intention to live in his apartment building, but he did not desire so to do so long as the Prendergasts are in it; and that he does not desire to rent any of the apartments to Negroes. [R. 64, 65.]

Petitioner Snyder moved in the trial court for a summary judgment dismissing the Prendergasts' complaint and granting him the relief prayed for in the cross-complaint. [R. 58-59.] The motion was supported by averment of facts designed to show the economic loss he would suffer if he could not keep Negro tenants out of his building. [R. 59-62, 67-69.] The real, though implicit, ground of the motion, however, was, in substance that, by reason of section 26 he had the absolute right to refuse, on racial grounds, to rent or lease. [R. 59, 65-66, 73.] The trial court ruled that for the court to grant any relief on the cross-complaint would be to violate the Fourteenth Amendment. Accordingly, it entered judgment dismissing the cross-complaint. [R. 80.]

Petitioner Snyder appealed from the judgment. The State Supreme Court affirmed, primarily on the same grounds for which it reversed *Mulkey* [R. 81, 83-84]; and alternatively, on the ground that judicial enforcement of the racially motivated eviction would be unconstitutional. [R. 84.]

3. *Racial Discrimination In California.* Racial discrimination in California is not a new story.[7] It has existed a long time and its roots are deeply embedded in the State's history and the habits and customs of its people.[8] The result has been extensive *de facto* resi-

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[7]Petitioners seem to equate racial discrimination with private prejudice or bigotry. [*Br.*, 42.] No doubt such prejudice or bigotry is a frequent motivation of the discrimination, but it is not the only one. Other motivations stem from economics, social snobbery, and direct and indirect influences of various governmental policies of action or inaction that coerce or encourage the discrimination. The important thing is not the motivation, but the result or fact of racial discrimination. When the latter exists its impact upon those discriminated against and upon society as a whole—personal humilitation, deprivation of personal dignity, *de facto* relegation to second-class citizenship, denial of equal participation in communal life, creation of slums and their sequelae of disease, crime and anti-social attitudes [see, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-253, 291-292; *Senate Report No. 872*, 88th Cong. 2d Sess., p. 16; *Burks v. Poppy Construction Co., supra*, 57 Cal. 2d at 471, 370 P. 2d at 317, 20 Cal. Rptr. at 613; *Jackson v. Pasadena School Dist.*, 59 Cal. 2d 876, 880, 881; 382 P. 2d 878, 880-881, 882; 31 Cal. Rptr. 606, 608-609, 610]—are the same, regardless of the motive that produced the discrimination. [See, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725.]

[8]Until 1952, the state constitution required the legislature to authorize cities and towns to remove Chinese from their limits or compel them to live in prescribed areas within those limits; and it prohibited the employment of Chinese by corporations or on public works. [*Cal. Const.* (1879) art. XIX, secs. 2, 3, 4.] Chinese, as well as Negroes and Indians, were judicially held to be incompetent to testify as witnesses in any case to which a white was a party. [*People v. Hall*, 4 Cal. 399.] Other forms of official discrimination against Chinese led to one of the earliest of this Court's decisions to apply the Equal Protection Clause to racial discrimination. [*Yick Wo v. Hopkins*, 118 U.S. 356.]

Segregated schools for Negroes, Indians, Chinese, Japanese and Mongolians were authorized by statutes [*Cal. Laws, 1869-70*, p. 838, secs. 53, 56; *Kerr's Cal. Political Code* (1920), secs. 1662, 1669, 1670; *Cal. Education Code* (1943), secs. 8003, 8004; and see *Wysinger v. Crookshank*, 82 Cal. 588, 23 Pac. 54; and *Ward v. Flood*, 48 Cal. 37, 17 Am. Rep. 405], the last of which was not repealed until 1947. [Cal. Stats. 1947, c. 737, p. 1798.] Mexican-Americans have been segregated into separate

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dential segregation of racial minorities, especially Negroes. This result, it is no doubt true, has not been caused solely by racial prejudice, but it has been caused by racial *discrimination*. That discrimination is itself the product of the interplay of private and governmental action. In sum, discrimination (whether motivated or caused by prejudice is immaterial), has been the prevalent pattern of conduct by owners, brokers, lender and builders in California. [U.S. Commission on Civil Rights, *50 States Report*, pp. 43-46; U.S. Commission on Civil Rights Report (1961), *Book 4, Housing*, pp. 2-4, 132-138, 144-145.] An important part has been played by active aid from government, such as, for example, enforcement of restrictive racial covenants, and compulsion or coercion, as well as toleration, of or permission to engage in discriminatory practices. [See, fn. 8, p. 11, *supra*. Also, pp. 33-34, *infra*.] From that interplay of private and governmental conduct there has resulted a widespread and long-standing

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schools [see, *Westminster School District v. Mendez*, 9 Cir., 161 F. 2d 774], and denied admission to public recreational facilities. [See, *Lopez v. Seccombe*, S.D. Cal., 71 F. Supp. 769.] Negroes have been discriminated against in admission to low-rent public housing [see, *Banks v. Housing Authority*, 120 Cal. App. 2d 1, 260 P. 2d 668, *cert. den.*, 347 U.S. 974]; and Japanese have been prohibited from owning land. [See, *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617.]

Race covenants in deeds that restricted occupancy of the property to Caucasians were held valid and enforceable [see, *e.g., Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 682-683, 186 Pac. 596, 597-598], until 1948, when, under the compulsion of *Shelley v. Kraemer*, 334 U.S. 1, they were held judicially unenforceable. [*Cumings v. Hokr*, 31 Cal. 2d 844, 193 P. 2d 742.] An idea of the considerable extent to which these restrictions were used may be gleaned from the fact that in *Cumings*, 31 Cal. 2d at 845-846, 193 P. 2d at 742, seven such California decisions are cited; and there are at least three more. [*Janss Investment Co. v. Walden*, 196 Cal. 753, 239 Pac. 34; *Forest Lawn Memorial Pk. Assn. v. De Jarnette*, 79 Cal. App. 601, 604, 250 Pac. 581; *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 233, 238, 146 P. 2d 720, 721, 724.]

community custom of discrimination, which, in its turn, has produced in California extensive *de facto* segregation or zoning along racial lines.[9]

In any community in which there is a substantial non-white population, residential areas are divided into white and non-white zones or districts that are as sharply defined as though laid out to conform to an ordinance fixing their boundaries. Few, if any, of the non-whites live or are able to live in the white zones, even though they may desire and can afford to live there. They are forced to live in the district that by discriminatory community custom has become the district allotted to them. The facts in this regard are notorious; they are matters of common knowledge, as they are apparent and observable to anyone who passes through the districts in question.[10] They have been documented in detail in a good many studies, official reports and judicial decisions.[11] Typically descriptive of

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[9]The governmental forces at work that contribute to this community custom in California are described by Judge Loren Miller in "Government's Responsibility for Residential Segregation" published in *Race and Property* (fn. 11, p. 13, *infra*), pp. 58, 60-64.

[10]Such facts are judicially noticeable in California [Cases cited, fn. 3, p. 6, *supra.*]

[11]The Court, of course, may resort to any source that satisfies its mind, to inform itself of the facts that it notices judicially. [Wigmore, *Evidence* (3d ed.), Vol. 9, sec. 2658a, pp. 537-538; *People v. Mayes,* 113 Cal. 618, 626, 45 Pac. 860, 862.] Among the many sources from which the Court may inform its judicial knowledge of residential segregation in California (to all of which the court below was referred by one or another of the parties), are the following:

U.S. Commission on Civil Rights Report (1961), *Book* No. 4, *Housing* (1961), pp. 1-4, 132-138, 144-145.

U.S. Commission on Civil Rights, *50 States Report,* California Advisory Committee (1961), pp. 43-46.

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the conditions in California, in which, of course, section 26 must operate, is the following from the California Advisory Committee to the U. S. Commission on Civil Rights, reporting in 1961 [U. S. Commission on Civil Rights, *50 States Report,* pp. 43-46]:

> "The State of California has a large and increasing Negro population. These people live mainly in segregated patterns in major urban centers of the State. In most cases, Negro housing areas are considerably less attractive than housing in other areas. . . .
>
> "As California's Negro population increases, pressure builds up in the great urban ghettos, and slowly but perceptibly the segregated areas enlarge. The Committee found that, as a general rule, Negro families do not move individually throughout the community. They move as a group. This is true in most cases of the relatively high-wage Negro professional group. It is practically universally true of Negroes in the lower income mass-group.
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> * * * *
>
> "This Negro housing problem is widespread. Negroes encounter discrimination not only where houses in subdivisions and in white neighborhoods

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Los Angeles County Commission On Human Relations, *Population Housing In Los Angeles County* (1963), pp. 2-4.

U. of Calif. Extension Series On Public Issues, *Race and Property* (Diablo Press 1964. Denton ed.), pp. 6-8, 58-76.

McEntire, *Residence and Race* (U. of Calif. Press, 1960), pp. 32-67.

Kaplan, *Discrimination in California Housing,* 50 Cal. Law Rev. 635, 644.

Jackson v. Pasadena School District, 59 Cal. 2d 876, 878-879, 382 P. 2d 878, 880, 31 Cal. Rptr. 606, 608.

are concerned but also in regard to trailer parks and motels. Testimony received by the Committee indicated that the trailer-park situation is particularly acute and that, especially in the southern part of the State, few, if any, trailer parks will accept Negroes."

In McEntire, *Residence and Race* (*op. cit.*, fn. 11, p. 13, *supra*), pp. 32-67, there is a chapter describing residential patterns in twelve large cities representing the major regions of the country, including, at pages 61-66, maps showing the racial concentrations in San Francisco and Los Angeles. The upshot of these extensive surveys of residential conditions is to prove beyond dispute the existence in California, as in many other places, of *de facto* racial zoning.[12]

4. *Enactment of Section 26, and Its Purpose.* Prior to 1959 there was no prohibition, direct or indirect, in California, of racial discrimination in the sale, rental or leasing of residential property. There was, however, a civil rights statute of fairly limited scope. [Cal. Stats. 1905, c. 413, p. 553; *Cal. Civil Code* (1923), secs. 51, 52.] It did not cover all persons, but was limited to citizens, who, it was declared, were entitled to the full and equal accommodations, facilities and privileges of inns, restaurants, theaters and similar places of public accommodation. In 1959, this statute was extended to proscribe discrimination in all business establishments;

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[12]Even if racial zoning or segregation is not due primarily to racial prejudice, it exists and in practical operation amounts to discrimination. Section 26 has the effect, indeed the intended effect, of enabling the segregation to continue and to spread; and, as well, to burke governmental efforts to eliminate it or prevent its future extension, by direct, proscriptive action against private contributions to the condition. [See, pp. 15-18, *infra.*]

and its benefits were made applicable to all persons within the State's jurisdiction. [Cal. Stats. 1959, c. 1866, p. 4424. See fn. 5, p. 8, *supra.*] And, also in 1959, by the Hawkins Act, racial discrimination in the sale, rental or leasing of "publicly assisted" housing was prohibited.[13] [Cal. Stats. 1959, c. 1681, p. 4074.]

Nonetheless, there was throughout the State a high degree of *de facto* residential segregation and districting along racial lines. [See, pp. 11-15, *supra.*] Public attention on that condition was focused in 1963 by a number of mass, and sometimes turbulent, protest demonstrations in and about residential subdivisions whose owners and developers were or were charged to be discriminating against Negroes. Ultimately, in that year, the Rumford Fair Housing Act was enacted. [Cal. Stats. 1963, c. 1853, p. 383; *Cal. Health and Safety Code,* Div. 24, Part 5 (beginning with section 35700).] This Act prohibited discrimination in housing accommodations because of "race, color, religion, national origin or ancestry" and declared such discrimination to be against the public policy of the State. [Cal. Stats. 1963, c. 1853, pp. 3823, 3824, sec. 2; *Cal. Health & Safety Code,* secs. 35700, 35720.] It also set up a comprehensive system of enforcing that prohibition. The system included provisions for investigation and mediation of complaints of discrimination, as well as for prevention or compelled cessation of it.[14] [Cal. Stats. 1963, c. 1853, p. 3825; *Cal. Health & Safety Code,* Div. 24, Part 5, Ch. 4, beginning with sec. 35730.]

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[13]The Hawkins Act was superseded and repealed in 1963 by the Rumford Fair Housing Act. [See, p. 16, *infra.*]

[14]Only the prohibitory provisions of this comprehensive statute are printed by petitioners at pages 10-11 of the Appendix to their Brief. The procedural provisions, through which the purpose of the statute is to be achieved, are omitted.

Adoption of the Act was vigorously opposed by such real estate and property owners' organizations as the California Real Estate Association, California Committee for Home Protection, and the California Apartment Owners Association [see, *Br.*, Appendix, pp. 3, 5,]. Notwithstanding that a campaign to subject the Act to a referendum was begun, those opponents of the Act refused to support the referendum. They wanted more than mere repeal, more than an absence of legislation prohibitory of racial discrimination in the disposition of residential property. What they wanted was an amendment to the state constitution that would affirmatively and absolutely secure the right so to discriminate. So, they quickly commenced qualification of an initiative measure to undo what the legislature had done and to restore and secure freedom to discriminate beyond the power of the State to interfere. The ultimate result was the addition of section 26 to the State constitution. [U. of Calif. Extension Series On Public Issues, *Race and Property* (Diablo Press. 1964, Denton ed.), pp. 6-8.]

As is required by California law [*Cal. Elections Code*, Div. 4, chap. 1, article 3 (beginning with section 3555)], submission of the measure to the electorate was accompanied by official arguments pro and con, a copy of which went to every registered voter in the State.[15] [See, *Br.*, Appendix, pp. 2-7.] The argument

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[15]These "ballot arguments" are, in California, an accepted aid to ascertainment of legislative intention and purpose. [*People v. Ottey*, 5 Cal. 2d 714, 723-724, 56 P. 2d 193, 197-198; *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 515, 11 P. 2d 857, 860, quoting and approving the opinion in *Crooks v. People's Fin. etc. Co.*, 111 Cal. App. (Supp.) 769, 775-776, 292 Pac. 1065, 1067; *Crees v. Cal. State Board*, 213 Cal. App. 2d 195, 211, 28 Cal. Rptr. 621, 630-631; *In re Goddard*, 24 Cal. App. 2d 132, 140-141, 74 P. 2d 818, 823-824.]

in favor of the measure laid bare its purpose to permit and enable the carrying on of the practice of racial discrimination in the sale, rental and leasing of residential property. It did so in these words:

> ". . . this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.
>
> "Most owners of such property lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.
>
> * * * *
>
> "Your 'Yes' vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another." [*Br.*, Appendix, p. 3]

Section 26 as proposed and adopted did not expressly repeal the Rumford Act or any other statutory or constitutional provision. Whatever repealing effect it may have had was but the consequence to be implied from its positive prohibition, as a part of the State constitution, of any denial, limitation or abridgement of the right of any person "to decline to sell, lease or rent [his] property to such person or persons as he, in his absolute discretion chooses."

Summary of the Argument.

(1) By an amendment to its constitution (section 26), the State of California has provided that neither it nor any subdivision or agency thereof shall deny, limit or abridge the right of an owner of residential property to refuse to sell, lease or rent it to such person as he in his absolute discretion chooses. The avowed purpose of the amendment was to make it possible once again, as it recently had not been lawfully possible because of prohibitory statutes, but as before, had been the long-standing community custom, to refuse to sell, lease or rent residential property to Negroes and other racial or religious minorities. Two actions in the state courts were brought by Negroes against the petitioners here, who are in the business of renting apartments to the public in buildings they own. One of these actions was for injunctive relief and monetary damages on account of a racially motivated refusal to rent an available apartment; the other was to enjoin an eviction of a husband and wife from an apartment, because the husband was a Negro. In these actions, section 26 was invoked by the petitioners in justification of the racial discrimination against which the actions were brought.

Section 26, by reason of its inherent and admitted purpose to authorize or permit racial discrimination and its natural operation and effect to accomplish that purpose, is obnoxious to the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and to the Supremacy Clause, of the Constitution of the United States, because it involves the State in the racial discrimination practiced on respondents and which is being and will be practiced on many others similarly situated. This involvement of the State is the equivalent

of "state action" and is established by these considerations:

First: The State has made the right to discriminate on racial grounds in the sale, rental or leasing of residential property, a secured and absolute constitutional right. It, therefore, has done much more than, through inaction or indifference, merely to permit such discrimination. It has made a deliberate and purposeful choice to make a constitutional right out of racial discrimination. That is, in necessary and realistic effect, authorization by the State of the ensuing discrimination.

Second: The State, acting formally and officially by enactment of an amendment to its constitution, has encouraged its people to discriminate against racial minorities. The amendment was enacted for the purpose of enabling such discrimination to take place. It was enacted in the context of a deep-seated and long-standing custom and habit of its people to discriminate. It assured those who desired to and did discriminate that no state governmental agency or subdivision could or would impose any sanctions upon them in respect of the discrimination. Taken together, all this amounts at least to encouragement. The State may no more encourage than it may authorize or command racial discrimination.

Third: The State has disenabled itself and all its agencies, including, of course, its courts, from acting directly against racial discrimination, or from rendering any relief in respect of a racially motivated refusal to sell, rent or lease residential property. In that way, the State has abdicated all duty or responsibility not to leave its people remediless against conduct that irreparably injures them by depriving them of their federally secured constitutional right to be free of racial

discrimination. Such a duty of protection is implicit in the Fourteenth Amendment, for without it a State could nullify a right secured under it by simply clearing out all statutory or other legal barriers in the way of desired private conduct destructive of the right. This duty of protection is repudiated in California by the operation and effect of section 26. The State has withdrawn from the field; it has rendered useless and ineffective the right of petition to the state courts for relief against the irreparable injury caused by privately effected racial discrimination. Denial of a remedy for irreparable injury wrongfully caused, is a denial of due process.

Fourth: Section 26 is not merely a repeal of the theretofore existing legislation prohibiting racial discrimination in the disposition of residential property. It goes beyond that simple operation by involving the State in private racial discrimination, and by creating a state-constitutionally secured right to discriminate. Moreover, it was adopted precisely in order to clear the way for and enable that discrimination to flourish. The State thus has sought to do by indirection, *i.e.*, by the freeing of private desires and acts, what it cannot constitutionally do directly. The indirect route is no more open to it than the direct one. The Fourteenth Amendment bars both. When repeal is the method chosen to go down the indirect route, it, too, is barred.

Fifth: In appropriate and constitutionally permissible enforcement of the Fourteenth Amendment, the Congress has guaranteed all persons the same right to make contracts and to purchase, hold and lease real property as is enjoyed by white persons. That right is not limited in its operation to infringement by the States, but applies as well to private conduct destructive or injurious

of it. Section 26 in its authorization and encouragement of a limited right of purchase, holding or leasing on the part of racial minorities, is patently inconsistent. It, therefore, falls under the Supremacy Clause.

(2) In *Snyder,* in addition to the grounds already summarized, there is another ground that supports the judgment. It is that the relief sought by petitioners and denied by the court was judicial enforcement of racial discrimination, *i.e.,* enforcement of an intended eviction of a tenant solely because he is a Negro. For the State so to use the full panoply of its judicial power in aid of a racially discriminatory design, is to deny to those against whom enforcement is sought the equal protection of the laws. A statute authorizing or commanding such evictions would clearly be unconstitutional. The case is no different, merely because the identical result is effected through action of the State's judicial rather than its legislative department. Nor is the case different because the effect of judicial enforcement of the eviction is not to compel a discriminatory decision to be made by one who, but for the compulsion of the court's process, would make a non-discriminatory decision. The result of the enforcement is, nonetheless, to impose discrimination upon its unwilling victim, whose constitutional right it is to be free of racial discrimination at the hands of the State.

ARGUMENT.

I

The State of California Has Made Racial Discrimination in the Course of Dealing in the Sale and Rental of Residential Property a Right Secured by the State Constitution. In That Way the State Has Conferred the Authority of Its Highest Law Upon the Discrimination; and Has Acted Unconstitutionally to Deny Equal Protection of the Laws to the Victims of It.

First: The statute here involved adds to the Constitution of the State of California a provision that prohibits the State and all of its governmental subdivisions and agencies from regulating or limiting the right of any owner of residential property to sell, rent or lease or to refuse to sell, rent or lease the property to such person as the owner in his absolute discretion chooses. Manifestly, the right to refuse to sell, rent or lease because of the proposed acquirer's race or religion is embraced within the absolute discretion thus given constitutional sanction.[16] The natural operation and effect of this provision—by which, of course, its constitutionality must be judged [see, *Yick Wo v. Hopkins, supra,* 118 U.S. at 373; *Near v. Minnesota,* 283 U.S. 697, 708-709; *Bailey v. Alabama,* 219 U.S. 219, 235-236; *Davis v. Schnell,* S.D. Ala. (3-judge court), 81 F. Supp. 872, 880, *affirmed* 336 U.S. 933]—is plain to see. It is, so far as it is possible for a state to make it so, to enact racial discrimination in the sale, rental and

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[16]That was the construction put upon section 26 by the State court. [R. 18, 20, 27-29.] Its construction of the State legislation is, of course, binding upon this Court. [*Cramp v. Board of Public Instruction,* 368 U.S. 278, 285, and cases there cited.]

leasing of residential property into an impregnable constitutional right.[17] The section was in fact designed to accomplish just that legitimation of the practice of racial discrimination, and thus to authorize and clear the way for it. The State's voters were authoritatively so told, when the measure was submitted to them. [See, pp. 17-18, *supra.*]

Section 26, as petitioners insistently argue [Br., 13, 17-24, 33-37], is indeed a choice of policy by the State. But, it is not the simple choice that petitioners describe, *i.e.*, only a choice to be neutral in the matter of racial discrimination; or to deal with only one part of the problem, or meet it from a gradualistic approach, enacting or leaving in force such palliative measures as fall short of prohibiting the practice. It is, rather, a conscious and intended choice to make racial discrimination possible and to make it safe to carry it on, by immunizing it from any sanctions of the law; and, in that way, to secure and authorize it. Because, as petitioners insist, it *is* a deliberate and official choice of policy by the State, there is no need in this case to engage in any protracted search for "state action." A choice has been made by the State, and that choice is the formal and official act of the governmental establishment. That is state action enough to bring it within the proscriptive reach of the Fourteenth Amendment.

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[17]As a part of article I of the state constitution, entitled "Declaration of Rights," section 26 finds itself in the company of and on a parity with such other constitutionally secured rights as freedom of speech, religion and assembly, and due process of law. [*Cal. Const.*, art. I, secs. 4, 9, 10, 13.] The intention to give the right to discriminate a preferred and secure position could not have been better evidence. Of all of the states of the Union, California is the only one that has elevated racial discrimination into a constitutional right.

Second: In the circumstances of community history and custom, resulting in *de facto* residential segregation [see, pp. 11-15, *supra*], section 26 is an encouragement of resumption and continuation of the custom. It puts behind the discriminatory custom the authority and prestige of the State.

The avowed purpose of section 26 is to permit reversion to this custom of racial discrimination and thus to permit resumption of the practice that Rumford had proscribed. That in itself is authorization of the practice—as is demonstrated by the fact that it is precisely the authorization of law effected by section 26 that was invoked below by petitioners in legitimation of their admitted discrimination. [R. 10, 72-73.]

The State, of course, may no more authorize than it may itself directly engage in racial discrimination. [See the cases cited and discussed in fn. 19, p. 26 *infra*.] Authorization, no doubt is, qualitatively, something more than mere inaction; but to find an authorization of a given practice, there need not have been a command to engage in, or an explicit approval of the practice. [See, *McCabe v. A. T. & S. F. Ry. Co.*, 235 U.S. 157, 158, 160, 162; *Simkins v. Cone Memorial Hospital*, 4 Cir. (*en banc*), 232 F. 2d 959, 968, *cert. den.* 376 U.S. 938. Also, fn. 19, p. 26 *infra*.] It may be found in a purposeful choice by the State not to stop, and in that way to evince its approval of, a practice it has the power to stop.[18]

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[18]The instant case is not one of being free to engage in racial discrimination because, by reason of the State's inaction or indifference, there has been no prohibition of it. The case is one of a deliberate choice by the State, expressed in a formal and authoritative exercise of its legislative power, not to prohibit the practice, *in order that it may be freely engaged in* as and whenever desired. That plainly is more than inaction or indifference. [See, pp. 26-27, *infra*.]

Third: Because of section 26, racial discrimination in housing accommodations in California is now permissible. It is permitted to flourish in the context of the deeply embedded community custom to which we have referred. [See, pp. 11-15, *supra.*] This governmental toleration of racial discrimination is the result of much more than legislative indifference; it is the result of the fact that the State has purposefully chosen, in order that the discrimination may go on, to pursue a policy of abstaining, indeed disabling itself, from prohibition or regulation of it. To make that policy effective the State has made racial discrimination a constitutional right. In that context, and for that purpose, the State's choice was not merely indifference or neutrality. [*Cf., Pet. Br.*, 13-14, 17-24.] It was authorization and approval. To be sure, the State compels no one to discriminate; but it enables and deliberately permits, in short, it authorizes those who want to discriminate to do so. [*Cf., Shelley v. Kraemer,* 334 U.S. 1, 19.]

Such a deliberate or conscious choice certainly involves the State in the discrimination to at least as great an extent as government was involved in the private activities with which this Court was concerned in *McCabe v. A.T. & S.F. Ry. Co., supra,* 235 U.S. 151, and *Public Utilities Com. v. Pollak,* 343 U.S. 451. In each of these cases an analogous choice was found to involve the government sufficiently to come within the reach of the Fourteenth and Fifth Amendments, respectively.[19]

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[19]In *McCabe* a state statute required separate accommodations for the white and black races on railway trains, but provided that nothing in the statute should be construed to prevent railway companies from hauling sleeping and dining cars to be

(This footnote is continued on the next page)

The short of the matter is that it is not necessary, in order to invalidate section 26, to rest decision upon any proposition that State neutrality or inaction [see *Br.*, 17-18, 33-34, 41] is the equivalent of action under the Fourteenth Amendment. Nor is it necessary to find that section 26 commands or directs racial discrimination. It is enough, to involve the State in the discrimination, when it occurs, that those who discriminate have been left free to do so by the deliberate and approving choice of the State. That choice is action; and it is certainly the equivalent of an affirmative authorization.

Fourth: Petitioners refer to *Marsh v. Alabama*, 326 U.S. 501, as a case in which the reason why the Fourteenth Amendment was applied to private conduct, was

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used exclusively by either white or negro passengers. Thus, railways were permitted but not required to provide sleeping and dining cars for whites only. That non-mandatory but merely permissive proviso, this Court said, made the denial of such accommodations to negroes by the carrier, action taken "under the authority of a state law . . ." [235 U.S. at 158, 160-162.] Section 26 similarly authorizes racial discrimination by property owners.

In *Pollak*, the Public Utilities Commission of the District of Columbia had dismissed an investigation into the practice of a privately owned streetcar company of broadcasting radio programs in its cars. The Commission's order did no more than to refuse to prohibit the practice, because, as it found, public safety, comfort and convenience were not impaired by it. Nonetheless, even though the First and Fifth Amendments "apply to and restrict only the Federal Government and not private persons . . ." this Court agreed with the reasoning of the Court of Appeals to the effect that "the action of [the company] in installing and operating the radio receivers, coupled with the action of the . . . Commission in dismissing its own investigation of the practice, sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments . . . applicable to the radio service . . ." [343 U.S. at 461-462.] There is in the case at bar, a closely similar interplay between the petitioners' discriminatory conduct and the State's official toleration of it.

that the private entity concerned was a "community [company town] *authorized* by the State to perform exactly the same kind of functions as a publicly owned municipality . . ." [*Br.*, 30, Italics ours.] There was not in *Marsh,* any state statute or other governmental promulgation that directed, approved or enabled the owner of the company town to operate it as a municipality. The State, however, had put the full force of its criminal law (in the form of a trespass statute) behind the suppression of speech and religion with which that case was concerned [326 U.S. at 505, 508-509]; and it had permitted (though not expressly or by any official action) the company to operate its property in effect as though it were a town. [326 U.S. at 502, 508-509, 510-511]. This Court's opinion in *Marsh* was written by Mr. Justice Black. In his dissent in *Bell v. Maryland,* 378 U.S. 226, 318, 326-327, he disagreed with the view that application of a state trespass statute to private conduct, which was an expression of protest of segregated service in a restaurant, brought the conduct within purview of the Fourteenth Amendment.

We are, therefore, entitled to reject petitioners' assertion that the state "authorization" they find in *Marsh* came from the trespass statute there involved [*Br.*, 45]; instead, we suggest, that the "authorization" in that case must have come from the state's toleration of the operation of the company town. The case at bar calls, *a fortiori,* for a finding of state authorization, since the private conduct here in issue is not only tolerated by the State, but is conduct which the State, acting officially and affirmatively, has made into a constitutional right.

II.

The State Acts Within the Meaning of the Fourteenth Amendment When, as Here, It Becomes Significantly Involved in Private Action That Impairs Fourteenth Amendment Rights.

First: "State action" within the meaning of the Fourteenth Amendment need not be a formal exercise of governmental power or an official act of the governmental establishment.[20] Private acts of a sort that if officially or formally done by the State would unquestionably come within the proscription of that Amendment, still come within it if the State can be fairly said to be involved in or responsible for them. [See, *United States v. Guest,* 383 U.S. 745, 755-756; Frankfurter, J., concurring, *Terry v. Adams,* 345 U.S. 461, 473.]

It is, no doubt, "a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. . ." Such involvement, however, need not "be either exclusive or direct . . ."; and it has been found by this Court "even though the participation of the State was peripheral,

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[20]This proposition is certainly implicit in the decisions that have effectively settled the rule that even a wholly unauthorized or unlawful act of some agent of the state may be "state action." [See, *e.g., Screws v. United States,* 325 U.S. 91, 110-112; *Monroe v. Pape,* 365 U.S. 167, 171-172; *Williams v. United States,* 341 U.S. 97, 99-101; *United States v. Price,* 383 U.S. 787, 792-793.]

Be that as it may, section 26 is a formal and official act of the State of California. It is authoritative legislation, enacted in one of the two ways by which legislation in that State may be adopted. [*Cal. Const.*, art. IV, sec. 1.] It is, therefore, "state action" in the classic sense. So, the question here is not whether the State has acted, for it has; but whether its action abridges federally-secured constitutional rights.

or its action was only one of several co-operative forces leading to the constitutional violation. . . ."[21] [*United States v. Guest*, 383 U.S. 745, 755-756. See also, *United States v. Price, supra*, 383 U.S. at 794 (fn. 7).] So, it is settled that governmental approval of or involvement in private conduct "need not reach the level of compulsion to clothe what is otherwise private discrimination with 'state action.'" [*Simkins v. Cone Memorial Hospital, supra*, 323 F. 2d at 968.]

There is no closed category of acts or conduct that will so involve the State in private racial discrimination as to make the Fourteenth Amendment applicable. [*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 725-726.] The test is State responsibility. What that means, the decided cases show, is some contribution by the State to the carrying on of the discrimination, in the form of enablement or encourage-

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[21]Petitioners elaborate at length upon this "commonplace" that the Fourteenth Amendment acts against the States, not against individuals [*Br.*, 24-28]; in doing so they also quote from this part of *Guest*. [*Br.*, 25.] But, they omit enough of it to de-emphasize and hide the fact that this Court there recognized, as it has on many other occasions [see, pp. 30-31, *infra*], that the State by involving itself in private conduct will bring the conduct within the reach of the Fourteenth Amendment. So, too, they ignore *Guest* so far as it declares that the participation that constitutes such involvement may be only "peripheral" and need amount to no more than "*one* of several co-operative forces leading to the constitutional violation." (Italics ours.)

There is not inherent in the instant case, therefore, any request or need "to adopt such expansive jurisdiction" as that which petitioners profess to fear. [See, *Br.*, 26-27.] The limited jurisdiction that has heretofore sufficed to apply the Fourteenth Amendment to private conduct in which the State is involved, suffices here to enable this Court to determine whether the court below correctly found such involvement and if it did, whether the conduct to which that involvement related was of a sort barred to the States by the Fourteenth Amendment.

ment or approval of it.[22] It is, we submit, not gainsayable that the State may not act to encourage racial discrimination by those over whose conduct it has the power of control and regulation. [See, *e.g., Lombard v. Louisiana, supra,* 373 U.S. 267; *Anderson v. Martin, supra,* 375 U.S. 399.]

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[22]Among the many kinds of conduct that have been held to amount to State involvement are: Exhortations by city officers not to protest racial segregation and which thereby encouraged private persistence in segregated operation of a cafe [*Lombard v. Louisiana,* 373 U.S. 267, 269-270]; the inciting or encouraging effect, in view of known private attitudes, of requiring the race of candidates to be printed on election ballots [*Anderson v. Martin,* 375 U.S. 399]; the interplay of private and state acts bringing about subjection of negroes to private reprisal as the consequence of State-compelled disclosure of their membership in a locally unpopular organization [*N.A.A.C.P. v. Alabama,* 375 U.S. 449, 463]; leasing premises upon which private discrimination takes place, though the discrimination is not commanded or suggested by the State [*Muir v. Louisville Park Theatrical Assn.,* 347 U.S. 971, *reversing* 6 Cir., 202 F. 2d 275; *Burton v. Wilmington Parking Authority, supra,* 365 U.S. 715; *Derrington v. Plummer,* 5 Cir., 240 F. 2d 922, 925-926]; encouraging use of racially discriminatory deed covenants, by allowing damages for breach [*Barrows v. Jackson,* 346 U.S. 249, 254]; administering a discriminatory private trust [*Pennsylvania v. Board of Directors,* 353 U.S. 230]; substituting private persons for a city as trustee of a private trust in order to permit discriminatory operation of the trust property [*Evans v. Newton, supra,* 382 U.S. 296]; financial assistance to businesses or establishments in which discrimination is carried on [*Simkins v. Cone Memorial Hospital, supra,* 323 F. 2d at 965-968]; permitting private regulation of primary elections, without any governmental control or suggestion, but for the implicit purpose of excluding negroes [*Terry v. Adams, supra,* 345 U.S. at 465-466, approving *Baskin v. Brown, supra,* 174 F. 2d 391, and *Rice v. Elmore, supra,* 165 F. 2d 387]; permitting or tolerating discrimination under authority but not the compulsion of state law [*McCabe v. Atchison, etc. Ry. Co.* 235 U.S. 151, 161-162; and *cf., Public Utilities Com. v. Pollak, supra,* 343 U.S. 451, and *Marsh v. Alabama,* 326 U.S. 501]; permitting *de facto* school segregation caused by neighborhood private residential patterns [*Jackson v. Pasadena School Dist., supra,* 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878; *Branche v. Board of Education,* E.D.N.Y. 204 F. Supp. 150]; encouraging discrimination by burdening integrated operation of places of public accommodation. [*Robinson v. Florida,* 380 U.S. 153, 156-157.]

Contrary to petitioners' assertions [*Br.*, 30-31, 33, 38-39, 45-47], the cases in which state involvement has been found, have not been only those that, to use petitioners' language, "deal with the rights of a citizen *vis-a-vis* his government . . ." [*Br.*, 31.] There are quite a few cases that are not so confined. The right of a person not to be segregated out of a private cafe, or private recreational facility, is not a right "*vis-a-vis* his government" in petitioners' meaning; but, if the private enterprise is conducted in or on property that is leased from the State, and even though the segregation is not coerced or affirmatively authorized or encouraged by the State, it may well be that the State is involved in the discrimination. In that event, the Fourteenth Amendment applies. [See, *e.g.*, *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715; *Muir v. Louisville Park Theatrical Assn.*, *supra*, 347 U.S. 971; *Derrington v. Plummer*, *supra*, 240 F. 2d 922.] Similarly, the right not to have to listen to a radio program while riding on a streetcar, is not one that is ordinarily one *"vis-a-vis"* the government, but government can be involved in it without going to the length of compelling the program to be broadcast. [*Public Utilities Com. v. Pollak*, *supra*, 343 U.S. 451.] Too, the right to be free from private reprisal because of membership in an unpopular organization, is not a right *"vis-a-vis"* the government; but, if a member suffers such reprisal by reason of governmentally compelled disclosure of his membership, there is such an interplay between the private and governmental acts as to bring the case within the Fourteenth Amendment. [*N.A.A.C.P. v. Alabama*, *supra*, 375 U.S. 469.]

Even if petitioners' argument were sound, its condition of private activity in the nature of a governmental function is met in the case at bar. [See, also, pp. 53-54, *infra.*] Zoning or districting of residential areas in a community is just as much of a governmental function as conducting an election or operating a park, a swimming pool or golf course. And, as Mr. Justice Black has said in explaining the grounds of the holding in *Shelley v. Kraemer, supra,* 334 U.S. 1, a private deed restriction confining ownership or occupancy of land to whites, "was in reality the equivalent of and had the effect of state and municipal zoning laws. . . ." [*Bell v. Maryland, supra,* 378 U.S. at 328-329, Black, J., diss.]

So is it with the private conduct here involved. It tends to bring about, in California it has brought about, residential zoning on racial lines as effectively as though commanded by law. [See, pp. 11-15, *supra.*] It, too, is, as the private conduct in *Shelley* was, "in reality the equivalent of and [has] the effect of state and municipal zoning laws." [See, also, St. Antoine, *Color Blindness But Not Myopia,* 59 Mich. Law Rev., 993, 999-1001, 1013-1014.]

Perhaps there are factors other than racial prejudice or bigotry that bring about the discrimination which contributes to the creation and continuation of *de facto* residential segregation. [*Br.*, 42-43.] It may be, of course, the result of putting a higher value on economics than on morality or tolerance; or the result of any one or combination of many causes. [See, pp. 12-13, 15 (fn. 12), *supra.*] But, whatever the cause of the discrimination, it surely cannot be merely a coincidence that there are racial ghettos, not only in California, but in

every urban area of the land. A court may fairly indulge the inference that the concentration of Negroes into a few districts, and their absence from those that are white is a condition that was brought about primarily, if not entirely, by the refusal of the great preponderance of white property owners to sell or lease to Negroes any residential property in a white section. That is discrimination in fact, whatever may be its subjective motivation. And surely it cannot be denied that cessation of a wide-spread practice of refusal would go a long way in the direction of preventing the spread of existing or the creation of new *de facto* segregation.

No doubt, zoning is usually accomplished by legislation or regulation that is coercive. The manner in which elections shall be conducted is also usually the subject of mandatory legislation, as are also the regulations pursuant to which government will operate parks and other public facilities whose operation it undertakes. But these functions may also be carried on by private persons; and when the question of state involvement depends on the nature of the function, the test is equivalency of result. Certainly, the private conduct of elections, of the sort that was interdicted in the "white primary" cases [see, pp. 50-53, *infra*], was not the exact duplicate of their conduct by government, especially in the circumstance that the rules and restrictions of the private variety were voluntary, instead of being coercive, as equivalent governmental regulations usually are. In general, and particularly in result, however, the two were equivalents; and so, when coercive or mandatory governmental regulation of the private activity was repealed to permit a discriminatory,

voluntary private operation, government became significantly involved.

Second: The State Supreme Court concluded that the State of California was significantly involved in the discrimination complained of at bar. [R. 20-29.] This conclusion is firmly grounded in the facts of the purpose for which section 26 was adopted and of its natural operation and effect to encourage racial discrimination by owners of residential properties. The conclusion is reinforced by the familiarity with local customs, conditions and practices of the State's people and businesses that the State Supreme Court must be deemed to have.

(1) Enablement and encouragement of the practice of racial discrimination in housing property was the object for the consummation of which section 26 was adopted. [See, pp. 17-18, *supra.*] The effects of section 26 go farther than the comparatively few instances of discrimination shown in the instant record. Section 26 is not a transient or temporary stop-gap. It is a part of California's organic law, designed to set a lasting standard. As such, it serves to preserve and extend the existing *de facto* segregation of the races. It strengthens and puts the seal of constitutional approval upon the established and readily expandable community custom of residential segregation. [See, Donnici, *The Decline and Fall of California's Proposition 14,* 1 Univ. of San Francisco L.R. 12, 20-22, 47-48.]

Official legislative zoning along racial lines would be undoubtedly unconstitutional. [*Buchanan v. Warley,* 245 U.S. 60; *Harmon v. Tyler,* 273 U.S. 668 (reversing *per curiam, Tyler v. Harmon,* 158 La. 439, 104 So. 200, 160 La. 943, 107 So. 704); *Birmingham v. Monk,*

5 Cir., 185 F. 2d 859, 862, *cert. den.* 341 U.S. 940; *Richmond v. Deans,* 4 Cir., 37 F. 2d 712, *affirmed* 281 U.S. 704.] It should be just as unconstitutional when, even though only *de facto,* the result is attained with the sympathetic encouragement of the State. The encouragement to racial segregation that section 26 gives is "one of the several cooperative forces" [*United States v. Guest, supra,* 383 U.S. at 755-756] that have led and will continue to lead to such segregation. [See, pp. 25-26, *supra.*]

(2) The natural operation and effect of section 26 is to encourage racial discrimination in residential housing. It was adopted against the background of a long and persistent history of such discrimination in the State; a background of an existing and embedded community custom of discrimination that had developed with much help from government. [See, pp. 11-15, *supra.*] The desire and will of a substantial number of people to discriminate was obviously puissant and ready to emerge as action, though held in check, at the time of the section's enactment, by recent proscriptive legislation and a growing judicial tendency to proscribe the discrimination, even without express statutory warrant. [See, pp. 15-16, *supra.* Also fn. 28, p. 47, *infra.*] Section 26 did much more than remove this check upon that desire or custom. It made action in furtherance of the desire immune from the law's sanction, existing or future; and it gave the actors official assurance that there would and could be no redress against them for racially discriminatory acts.

This was not mere neutrality, for it operated to the benefit and in aid of those whose known attitudes made it likely, indeed virtually certain, that they would

act in only one way—to discriminate. It is one thing to do nothing, one way or the other, thus leaving individual conduct to the unforced or uninfluenced preference and choice of the actor. It is quite another to assure those known to favor and to want to engage in a specific form of conduct, that they may do so without fear or let. The one may be neutrality or only indifference to the result. The other is an encouragement.

Surely, there is as much encouragement of racial discrimination in section 26 as there was in the hortatory shouts of the town officials in *Lombard* (*supra*, 373 U.S. 267), or the unadorned statement of a candidate's race in *Anderson* (*supra*, 375 U.S. 399). The short of the matter is that section 26 encourages racial discrimination, because it lets down the bars against the practice, makes exercise of it a secured and inviolable constitutional right and, in the context of established and long-standing community custom, puts the State's prestige and authority in the scales against any prohibition or regulation of the custom.

Third: It will bear some emphasis that this is not a case in which it is contended that the Fourteenth Amendment, of itself, forbids a State to enforce a general, non-discriminatory criminal statute against violators of it in situations involving protest of private racial discrimination. [*Cf.*, Black, J., dissenting, in *Bell v. Maryland*, 378 U.S. 226, 318.] Here, the Fourteenth Amendment is invoked against the State's involvement in private racial discrimination—an involvement that stems from an enactment that is not non-discriminatory, but one that was designed and enacted in contemplation of racial discrimination, and purpose-

fully intended to operate as an enablement and constitutional validation of it. More nearly apposite to that kind of a situation are the cases like those already cited [pp. 29-32, *supra*], in which some encouragement of or impetus toward racial discrimination was given by state legislation, administrative regulation, or other official approval. [see, also, *e.g., Robinson v. Florida, supra,* 378 U.S. at 155-157; *Peterson v. Greenville,* 373 U.S. 244, 247-248; Black, J., dissenting, *Bell v. Maryland, supra,* 378 U.S. at 326-328; White, J., concurring, *Evans v. Newton,* 382 U.S. 296, 305.]

Fourth: The question here is not, as petitioners would have it, how or to what extent or in what way the State should meet the problem of racial discrimination. [See, *e.g., Br.,* 33-37.] The question is whether the Fourteenth Amendment prohibits a State from involving itself in and on the side of such discrimination. The answer to that question has been put beyond doubt by this Court. [see, *e.g.,* the cases cited, fns. 22, 26, p. 31, *supra,* and p. 44, *infra.*] It may be that it is permissible for the State to remain inert or inactively neutral in the face of discrimination [but see, pp. 40-47, *infra*]. It is certain, however, that if the State does act, its action cannot be in favor of discrimination. When it comes to racial discrimination, a State's action can only be against it.

Section 26 is undeniably state action. [See, fn. 20, p. 29, *supra*]. More than than, it is affirmative action on the side of discrimination, not simply an innocuous declaration of neutrality. [See, pp. 23-24, 26, *supra.*] There is therefore, no room here for any deference to a legislative judgment on debatable issues of fact and

policy. [See, *Br.*, 28-37.] The supreme policy of the land in respect of racial discrimination has been established by an authority that no one State and no number of its voters, however large, may repudiate.

Fifth: Petitioners badly overstate the record when they say that the State Supreme Court fixed State involvement or responsibility "solely because in adopting Section 26 the people of California had 'nullified' previously enacted legislation prohibiting such conduct . . ."; and that it was "this sequence of legislative activity alone that the court below ultimately relied upon . . ." [*Br.*, 37.] Even if that were a correct epitome of the Court's discussion and conclusion on the subject of involvement or responsibility, it would be immaterial. This Court is not confined to the grounds of decision relied upon by the lower court. A successful party below may sustain its judgment on any ground that finds support in the record. [*Oklahoma v. United States Civil Serv. Co.*, 330 U.S. 127, 134 (fn. 3).]

In point of fact, however, state involvement or responsibility was found by the State Supreme Court for reasons quite different from the purported reason suggested by petitioners. For instance, section 26 was found to constitute state involvement because, *i.a.*, it provided for "a purported constitutional right to privately discriminate . . ." [R. 20]; the aid of the State's legislation was invoked to consummate and validate racial discrimination [R. 22-23]; and, the racial discrimination was accomplished with the culpable permission of the State, which had abdicated its traditional governmental functions for the obvious purpose of condoning the private discrimination. [R. 23-24.]

III

Since the Fourteenth Amendment's Prohibition Upon the States Imports a Duty on Their Part to Protect Those Within Their Jurisdiction Against Abridgement or Impairment of the Rights Secured by the Amendment, Repudiation by a State of Its Duty of Protection Is Action Within the Amendment's Reach.

The Fourteenth Amendment "granted the right to be free of racial discrimination . . ." [*Terry v. Adams, supra,* 345 U.S. at 468.] No doubt, that grant, so far as the direct operation of the Amendment is concerned, is a limitation upon state rather than private action; but its "aims" [see, *Katzenbach v. Morgan, supra,* 384 U.S. at 657], are more comprehensive. It imports a policy to eliminate from the communal life of the nation the divisive consequences of racial discrimination; and to secure to the individual a right that may be fully enjoyed and made to accomplish the purpose of freeing him from subjection to the injurious personal results of racial discrimination. That much is certainly implicit in the nature of the right; it has been made evident by this Court's determination, in *United States v. Guest, supra,* 383 U.S. at 761-762, 778-779, 781-783, that pursuant to the power given Congress to enforce the right, admittedly a prohibition on only the States, it is permissible to proscribe private action that is destructive of it. [See, also, pp. 55-60, *infra.*]

The State, of course, may not itself infringe the right to be free of racial discrimination. [Cases cited, fn. 26, p. 44, *infra.*] It involves no stretching of the Amendment's language or its fair import, therefore, to conclude that, to prevent denigration of the right it se-

cures, the State must protect its holder in the full enjoyment of it, and not leave him remediless against conduct invasive of it. [*Truax v. Corrigan,* 257 U.S. 312, 329-330. See, *Buchanan v. Warley, supra,* 245 U.S. at 77-78; *Marbury v. Madison,* 1 Cranch 137, 163.] A good many decisions may be brought together in support of the proposition just stated. The necessary rationale of the decisions is that there is a duty upon the State to protect the persons within its jurisdiction against conduct it has the power to proscribe, which conduct, even though it is not commanded by the State, will have the practical effect of abridging or denying full enjoyment of the constitutionally secured right.[23]

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[23]". . . The very highest duty of the States," this Court has said, is "to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator' . . . The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power . . ." [*United States v. Cruikshank,* 92 U.S. 542, 553, 555.] Mr. Justice Bradley, the author of the prevailing opinion in the *Civil Rights Cases,* 109 U.S. 3, in a letter to Circuit Judge Woods, said of the Fourteenth Amendment that ". . . denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection . . ." [Quoted by Mr. Justice Goldberg concurring in *Bell v. Maryland,* 378 U.S. 226, 309-311.] That letter had its effect, Judge Woods used its exact language in *United States v. Hall,* 26 Fed. Cas. 79, 81 (No. 15,282), in holding it was a violation of the Civil Rights Act of 1870 to prevent and hinder exercise of the constitutionally protected rights of speech and assembly.

The failure of State officers to protect one in their custody from the assault of a mob of private persons, it has been held, is a denial of Fourteenth Amendment rights. [*Lynch v. United States,* 5 Cir., 189 F. 2d 476, 479-480, *cert. den.* 342 U.S. 831; *Catlette v. United States,* 4 Cir., 132 F. 2d 902, 907.] In *United States v. Given,* 25 Fed. Cas. 1324 (No. 15,210), it was held to be a violation of the Civil Rights Act of 1870 for a tax collector to fail to collect a tax, for the nonpayment of which the right to vote was lost; the Court saying, that a "practical denial and abridgement" of the constitutional right was effected

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A duty of protection is a necessary corollary of the prohibition directed at the states. Unless there is such a duty upon the State's part, the Amendment is sapped of its vitality and its prohibitions are eroded into little more than a precatory admonition. If there is no such duty, means of violating the Amendment without consequent federal sanctions are put in the State's hands [*cf., Cooper v. Aaron,* 358 U.S. 1, 18; *Ex parte Virginia,* 100 U.S. 339, 347]; then, to evade the Amendment, the State need only clear the way for private violation of the right and merely look the other way when it occurs.[24]

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by the State's "indifference, refusal to pass such laws as harmonize with and aid in making [the right] available and secure to all citizens . . ."

A duty to remedy racial segregation in public schools, notwithstanding it was caused by residential segregation which was itself the result of private action, rather than of governmental doing, was found in *Branche v. Board of Education,* E.D.N.Y., 204 F. Supp. 150, 153. [To the same effect is *Jackson v. Pasadena School District, supra,* 59 Cal. 2d 876, 382 P. 2d 878, 31 Cal. Rptr. 606.] And in *Tate v. Department of Conservation,* E.D.Va., 133 F. Supp. 53, 61, *affirmed* 4 Cir., 231 F. 2d 615, it was said that when a State leased its property for operation of a park by private operators, the State had "to see that the park was operated by the lessee without discrimination."

[24]That is the way some States sought to deny Negroes the right to vote in party primaries—*i.e.,* by repealing all laws that stood in the way of treating the primary as the internal activity of a private club, and standing "neutrally" by while that private activity was kept closed to Negroes. That sophisticated attempt at escaping the command of the Fourteenth Amendment against denial of equal protection of the laws did not pass judicial scrutiny. [*Baskin v. Brown,* 4 Cir., 174 F. 2d 391; *Rice v. Elmore,* 4 Cir., 165 F. 2d 387, *cert. den.* 333 U.S. 875. And, see, *Terry v. Adams, supra,* 345 U.S. at 465-466.] See, also the comments of Senator Pool concerning the scope of the Fifteenth Amendment, that are quoted in the appendix to this Court's opinion in *United States v. Price, supra,* 383 U.S. at 809-811, and in which he anticipated State attempts at nullification of the Amendment by the expedient of omitting to protect the rights secured by it.

All this does not mean that a State is required to enact legislation proscriptive of racial discrimination or that is otherwise preservative of the constitutional right. [See, *Br.*, 36-37.] What it does mean is that if, by private conduct over which the State has the power of control, the right is infringed, the State must provide a remedy for it. If it does not, its choice not to protect the right involves it in the infringing conduct sufficiently to bring the Fourteenth Amendment into operation. The conduct, being then the equivalent of direct action by the State, may be the subject of such relief as will serve to make the infringed right fully effective. More than that, the expression of the State's choice, which in the instant case is, of course, section 26, is invalid, because it offends the command of the Amendment.[25]

Section 26 puts California in the position of repudiating any duty to provide such a remedy; and thereby it abridges the constitutional rights of respondents and others like them who, solely because of race, are being and have been subjected to discriminatory action in which the State is involved. The section disenables the State from providing any remedy for the injury inflicted upon a person by such discriminatory action. In consequence of this repudiation, it subjects persons to the imposition of irreparable injury upon them, and

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[25]A court of equity, state or federal, would have ample power to frame an appropriate decree. Cogent examples are at hand in the reapportionment and school-segregation cases. There it has not been felt to be enough simply to strike down the offending statute or regulation. The courts, in order to make the protected right effective, may also delineate the shape and order the adoption by the State of a constitutional substitute. [See, *e.g.*, *Brown v. Board of Education*, 349 U.S. 294; *Reynolds v. Sims*, 377 U.S. 533, 585; *Silver v. Brown*, 63 Cal. 2d 270, 278, 281-280, 405 P. 2d 132, 138, 140, 46 Cal. Rptr. 308, 314, 316.]

leaves them remediless in the premises. Through section 26 the State has withdrawn itself completely from the field of preventing racial discrimination in the sale, leasing or rental of housing property.

No search for "state action" need be made to bring this repudiation of a constitutionally imposed duty within reach of the Fourteenth Amendment. It is the product of the State's formal and official legislative action. Its result is a denial to racial groups of the law's protection against discrimination directed at them on account of their race. The unacceptability of race as a basis of classification under the Equal Protection Clause is now beyond possible dispute.[26]

Absent an applicable remedial statute, reparation for irreparable injury inflicted by private racial discrimination would normally be sought in the State's courts. Denial or refusal by the State of an effective remedy for irreparable injury inflicted, even though thorough private means, by invasion of a constitutional right, is a denial of due process of law, contrary to the Fourteenth Amendment [*Truax v. Corrigan*, 257 U.S. 312, 329-330. *Cf., Jackson v. Pasadena School Dis-*

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[26]The Fourteenth Amendment guarantees "the right to acquire and possess property of every kind . . . to dispose of it and to live upon one's own land, all "without discrimination on account of color, race, religion . . ." [*Buchanan v. Warley, supra*, 245 U.S. at 62-63, 64.] The first Mr. Justice Harlan's reference to the color-blindness of the Constitution [*Plessy v. Ferguson*, 163 U.S. 537,] has been carried into the modern decisions so firmly as to put racial discrimination beyond the legal pale in virtually every conceivable situation. [See, *e.g., Shelley v. Kraemer*, 334 U.S. 1; *Barrows v. Jackson*, 346 U.S. 249; *Brown v. Board of Education*, 347 U.S. 483; *Oyama v. California*, 332 U.S. 633, 639-640; *Burton v. Wilmington Parking Authority, supra*, 365 U.S. 715; *Terry v. Adams, supra*, 345 U.S. 461; *Anderson v. Martin, supra*, 375 U.S. 399; *Evans v. Newton*, 382 U.S. 296; *Pennsylvania v. Board of Directors*, 353 U.S. 230.]

trict, supra, 59 Cal. 2d 876, 382 P. 2d 878, 31 Cal. Rptr. 606.] "The very essence of civil liberty," said Mr. Chief Justice Marshall, "certainly consists in the right of every individual to claim the protection of the law whenever he receives an injury. One of the first duties of government is to afford that protection . . ." [*Marbury v. Madison, supra,* 1 Cranch at 163.] The right of access to the courts, there to claim that protection, is, of course, a right guaranteed by the Due Process Clause of the Fourteenth Amendment. [*Truax v. Corrigan, supra,* 257 U.S. at 329-330; *Brinkerhoff etc. Co. v. Hill,* 281 U.S. 673, 677-679.] It is, indeed, a form of the right to petition for a redress of grievances, secured by the First and incorporated into the Fourteenth Amendment. [*Brotherhood of R. Trainmen v. Virginia,* 377 U.S. 1, 5-8; *N.A.A.C.P. v. Button,* 371 U.S. 415, 429-430. *Cf., Thomas v. Collins,* 323 U.S. 516, 531; *Eastern R. R. Conference v. Noerr Motor Freight,* 365 U.S. 127, 136, 138.]

This right is abridged by section 26, for it denies any remedy whatever for injury caused by racial discrimination in housing, and it forestalls any effective access or petition to the State courts in that regard by prohibiting in advance any limitation upon the property owner's absolute discretion to refuse, for reasons of race, to sell, lease or rent.[27]

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[27]That prohibition is more than a mere legislative definition of what is or is not under State law an actionable wrong. It is the denial of any remedy in the State courts for an injurious invasion of the federally secured constitutional right to be, as was said in *Terry v. Adams, supra,* 345 U.S. at 468, "free of racial discrimination." It is this practical abridgement of a *federal* right which distinguishes the case, in respect of the right to petition the courts, from the case of a legislative definition, as a matter of local law, of the wrongs that may be redressed

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This forestalling effect operates in two ways. The first of these is that it prevents recognition in the State court of a cause of action under the Fourteenth Amendment for injurious conduct in which the State is sufficiently involved to make the Amendment applicable. It is not enough to defeat such a cause of action that the State has no remedial statute. The Fourteenth Amendment binds the State courts fully as much as it does any other department of government. [*Shelley v. Kraemer, supra,* 334 U.S. at 14-18.] The courts could not constitutionally refuse recognition of a cause of action properly made out under the Amendment. Section 26 compels refusal of such recognition, and so offends against the Amendment.

The second of the forestalling effects is that section 26 prevents the State courts from working out as a matter of the State's common or decisional law, a remedy for injurious racial discrimination. Without section 26, it was open to the State courts to work out a cause of action for injurious racial discrimination, proceeding "on principles of private justice, moral fitness and public convenience, which when applied to a new subject, make common law without a precedent . . ." [Willes, J., in *Millar v. Taylor,* 4 Burr. 2302, 2312, 98 Eng. Rep. 201. *Cf.,* Douglas, J., concurring in *Lombard v. Louisiana; supra,* 373 U.S. at 275-277.] Indeed, at the time section 26 was adopted the State Supreme Court was only a short step away from recognizing a

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in the state courts. In the latter case, the legislation is addressed to intererests of purely State provenance. [Compare *South Carolina v. Katzenbach,* 383 U.S. 301, 325, quoting *Gormillion v. Lightfoot,* 364 U.S. 339, 341, to the effect that exercise of a State's reserved powers is not insulated from *Federal* review when the "state power is used as an instrument for circumventing a federally protected right."

cause of action for privately caused injurious racial discrimination.[28]

Section 26 has rendered nugatory any chance the respondents may have had, by appropriate petition to the State courts, to bring about recognition of such a cause of action.[29] *Truax v. Corrigan, supra,* 257 U.S. 312, is in point in the present connection. There it was held to be a denial of due process for a State to deny the remedy of injunction against private conduct that invaded another's constitutional right of liberty and property. ". . . To give operation to a statute," this Court said, "whereby serious losses inflicted by such unlawful means [libelous statements] are in effect made remediless is, we think, to disregard fundamental rights of liberty and property, and to deprive the person suffering the loss of due process of law." At bar, the irreparable injury that ensues upon the subjection to racial discrimination need not be labored. It is a fact alleged and, for purposes of the litigation, admitted in the two cases that are here. [R. 4, 54; see, pp. 7-8, *supra.*] The persons suffering those losses are made remediless by section 26. In that way, the State has acted to deny respondents due process of law.

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[28]See, *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329, and *Williams v. International Brotherhood,* 27 Cal. 2d 586, 165 P. 2d 903, recognizing a right to relief in respect of racially motivated exclusion from a labor union. The reasoning by which that result was achieved is just as applicable to a racially motivated refusal to sell or rent residential property. Substitute "home" for the references "job" in the opinions and the applicability of the reasoning will become clearly apparent.

See, also, *Jackson v. Pasadena City School District, supra;* 59 Cal. 2d 876, 382 P. 2d 878, 31 Cal. Rptr. 606, in which, notwithstanding the absence of an applicable statute, relief was given in respect of *de facto* school segregation produced by *de facto* residential segregation.

[29]It may bear repeating that this is not merely an instance of a legislative determination not to recognize as action-

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IV

Repeal of Existing Legislation Prohibitory of Racial Discrimination, for the Purpose of Clearing the Way for Resumption and Continuation of the Discriminatory Practices, Is Itself an Unconstitutional Denial of Equal Protection of the Laws to Those Injuriously Affected by the Practices.

It is the persistent contention of petitioners [*Br.*, 23-24, 28, 37] that Section 26 does nothing more drastic than to repeal, by implication, California policy to prohibit racial discrimination in the sale and rental of housing accommodations—the policy embodied in the Rumford and Unruh Acts. [See, pp. 17-18, *supra.*] That is an oversimplification of the natural operation and effect, as well as of the purpose, of Section 26. [See, pp. 17-27, *supra.*] Even if it is not, the constitutionality of the section is not saved by treating it as only a repealing act. In an appropriate context, repeal of an existing policy may be unconstitutional. Such a context exists when repeal is the means of effectuating the State's deliberate choice to enable a result, constitutionally barred to the State, to be reached indirectly by private action and to clear the way for such action by doing away with prohibitions that serve to prevent private invasion of constitutional rights, and by formally severing any apparent connection of the State with the invaders. In other words, the State does not succeed in evading constitutional restraints by purposefully clear-

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able, given conduct that is wholly within the regulatory control of the State. It is a denial of a remedy for injurious impairment of a *federally* secured right. That is what distinguishes it from cases—*e.g.*, *Silver v. Silver*, 280 U.S. 117, 122—holding it within a State's competency to abolish rights recognized by the common law. [See, note 27, p. 45, *supra.*]

ing the way for accomplishment, through private rather than official action, of the unconstitutional objective of denying equality of treatment to racial minorities. *Evans v. Newton,* 382 U.S. 296, and the so-called "white primary" cases [see fn. 24, p. 42, *supra*] fully document the proposition just stated.

First: In *Evans,* the state court seemingly did no more than to accept the resignation of a city, as trustee of a trust of land to be used as a park for white women and children, and to appoint private persons in the City's stead as trustees. Yet, that action by the court was held to be unconstitutional state action within the meaning of the Fourteenth Amendment. What made it so, was the discriminatory purpose that underlay it —the purpose to clear the way for what the City could not itself directly participate in, a segregated operation of the park. Had it been thought, it was said in the majority opinion of this Court, that even the private trustees could not lawfully operate the park on a segregated basis, "the resignation would not have been approved and private trustees appointed . . ." [382 U.S. at 302; and see, also White, J., concurring, 382 U.S. at 303.] From that fact, the inference of discriminatory purpose was drawn. The state's involvement in the purpose was fatal to its action.[30]

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[30]The parties, and the United States as *amicus curiae,* briefed the case as one in which the State action involved was infected with unconstitutionality because of the discriminatory purpose that motivated it. That was the thrust of the statement of the question involved, as stated in the petition for certiorari. In its epitome of the case, the United States characterized it as one in which the State "has acted to transfer [the park] to private hands *in order to perpetuate segregation* . . ." as a consequence of which "the State bears substantial responsibility for the racial discrimination now enforced by the trustees, albeit they are

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Whatever doubt there may have been about the existence of the purpose in *Evans* [see Black, J. dissenting, 382 U.S. at 313-314], there can be none at bar; for here the legislative purpose to permit restoration and continuation of private discrimination is documented beyond dispute by the official explanations of the statutory purpose of section 26, which its proponents vouchsafed to the electorate, as well as by the events that brought about its submission and adoption, and by its natural operation and effect. [See, pp. 15-18, *supra.*] The factual premise upon which the majority in *Evans* acted exists in the case at bar. The purpose to clear the way for private discrimination by enactment of section 26 has been made very clear. [See, pp. 17-18, *supra.*] Here, as there, the State cannot evade responsibility for bringing about that which it desired and intended to bring about and which could not have been lawfully brought about without the State's timely and effective intervention.

Second: The white primary cases illustrate the technique that this Court in *Evans* found to be unavailing to dissociate the state from racial discrimination it purposefully permits. These cases show that even repeal may be unconstitutional action, if its purpose is to aid or encourage or enable private persons to do that which the Fourteenth Amendment denies to the State acting *qua* State. Outstanding in this regard, is the South Carolina effort to disenfranchise negroes—a story that is told in *Rice v. Elmore, supra,* 165 F. 2d 287, and *Baskin v.*

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nominally a private board . . ." [*Brief for United States,* p. 26 (italics ours)]. The respondents summed up their case with the comment that it is "not the proper business of any public authority to act affirmatively to clear the way for discrimination . . ." [*Respondents' Reply Brief,* p. 1.]

Brown, supra, 174 F. 2d 391—decisions to which this Court gave its approval in *Terry v. Adams,* 345 U.S. 461, 465-466.

South Carolina's method was a simple one. After *Smith v. Allwright,* 321 U.S. 649, made it seem likely that the State's legislatively designed primary system was open to the constitutional flaw this Court had exposed in the Texas system, South Carolina repealed "every trace of statutory or constitutional control of the Democratic primaries . . ." [*Terry v. Adams, supra,* 345 U.S. at 465-466.] The purpose of repeal, of course, was to bring about exclusion of Negroes from the primary by private action, leaving no apparent connection between that action and the State, by way of delegation or grant of authority, direction or control. So far as the State was concerned, it had simply repealed its policy of regulating and controlling primaries, and had assumed a neutral stance. It was, however, the readily inferable purpose of this device to make it possible for the Democratic Party, as a private organization and by its voluntary and uncontrolled choice, to effect the exclusion that the State as such could not. That purpose brought the ensuing private action within the proscriptive reach of the Fourteenth Amendment, as the following quotation from *Baskin v. Brown, supra,* 174 F. 2d at 393, shows:

> ". . . The devices adopted showed plainly the unconstitutional purpose for which they were designed; but, even if they had appeared to be innocent, they should be enjoined if their purpose or effect is to discriminate against voters on account of race . . ."

The Texas experience similarly shows that purposeful repeal may be unconstitutional action. In that state, primaries were legislatively regulated. The regulatory statute excluded negroes from participating in Democratic primaries. This Court held the statute unconstitutional. [*Nixon v. Herndon,* 273 U.S. 536.] The statute was then repealed and one enacted by which control of voting qualifications was given over to the party Executive Committee, ostensibly a private organization. That effort, too, was nullified by this Court. [*Nixon v. Condon,* 286 U.S. 73.]

The next move then, was an effort to accomplish the exculsory purpose entirely by private action; and so, the State Convention of the Democratic Party, acting without any authority, delegation or grant from the State, defined the Party membership as consisting of all qualified white voters. It was this apparently private action, in which the State had no part, that this Court, in *Smith v. Allwright, supra,* 321 U.S. 649, invalidated on the ground that the constitutional right to vote could not be nullified "by casting [the State's] electoral process in a form which permits a private organization to practice racial discrimination in the election . . ." [321 U.S. at 664.]

Third: These cases are not merely an *ad hoc* expedient to assure Negroes of equal voting rights. Implicit in them is a viable principle of constitutional law, capable and deserving of general application in the field of racial discrimination. This principle is that the State unconstitutionally involves itself in private racial discrimination when it designedly withdraws from the field in order to permit private accomplishment of the

discrimination in which it cannot itself directly participate.

The factual context in which the instant case arises, calls for application of this principle. The voters were officially told, as a reason why they should adopt section 26, that it would restore the *status quo ante* Rumford Act. Then, the property owners had the right, taken away by Rumford, to "refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry." [see, pp. 17-18 *supra.*] This was not just repeal; not just a change of policy from anti-racial discrimination to one of neutrality. It was a purposeful choice to restore and give free scope to the established community custom of racial discrimination. In that view of the matter, California's essay at repeal is just as vulnerable on constitutional grounds as were the similarly motivated efforts of South Carolina and Texas in the electoral field or Georgia's in the operation of its park.

Fourth: To be sure, the holding of a political election is a governmental function in which all have a constitutional right to participate upon equal terms. And, a State-operated park is a public facility to use of which, as against the State, all have an equal right. [*Br.*, 30-33.] These facts do not differentiate the cited cases from the one at bar. Indeed, they underscore the applicability to our facts of the principle upon which the decisions are grounded; for they show that *constitutional rights* will not be permitted to be nullified by private action, when the State has had some fair share of responsibility for bringing about or permitting the nullification.

People, no doubt, have a constitutional right to equality of voting and of access to public facilities. They also

have a constitutional right to be free of racial discrimination generally; and in particular, to be free of it in the acquisition, ownership and enjoyment of property. [Cases cited, pp. 40, 44 (fn. 26), *supra.*] So do they have a constitutional right not to be segregated into racial living zones or districts [cases cited, pp. 36-37, *supra*] or schools [*Brown v. Board of Education, supra,* 347 U.S. 483.]

These rights are as much entitled to vindication and protection as those involved in the primary cases or in *Evans.* Zoning or districting of a community is as much a governmental function as regulation of a primary election or operation of a park. [See, pp. 33-35, *supra.*] If the latter may not constitutionally be left in private hands for accomplishment of a discriminatory purpose, neither may the former. In either case, the purpose of leaving the matter to private discretion and the effect of what is done, is to nullify or impair the right. In either case, the overriding restraints of the Fourteenth Amendment may not be so easily or cynically loosened.

It is a superficial analysis of the cases to differentiate *Evans* and the white primary decisions on the ground that they involved the private exercise of governmental functions. That analysis ignores the factual context in which the discrimination occurred and the reason why the matter was left or put in private hands. It elides the fact that in the cited cases there was no actual or official delegation of power to the private persons involved, but only a clearing of the way to a voluntary assumption and discriminatory exercise by those persons of the governmental function, with the State standing by as a seemingly indifferent neutral. It ignores the fact that residential zoning is also a govern-

mental function. It fails, too, to extract from the decisions—from their rationale, facts and result reached—any generative principle to which they were a response.

V

The Civil Rights Acts, Constitutionally Enacted to Enforce the Fourteenth Amendment, Prohibit Racial Discrimination by Private Persons in Respect of the Acquisition, Ownership and Enjoyment of Property. Section 26, Being Inconsistent With These Federal Statutes, Is Invalidated by the Supremacy Clause.

1. Even Though Private, the Discriminatory Conduct Here Involved Is Barred by the Civil Rights Acts.

First: Decisions of this Court at last term have settled the power of Congress, as an appropriate means of enforcing the Fourteenth Amendment, to deal with private conduct that, even without state involvement, has the effect of abridging or impairing rights secured by the constitution of the United States. [See, *United States v. Guest, supra,* 383 U.S. at 761-762, 780-784; *United States v. Price, supra,* 383 U.S. at 805, 809-813; *Katzenbach v. Morgan, supra,* 384 U.S. at 648-651.[31] If, therefore, the Con-

[31]As a consequence of these decisions, application of the Civil Rights Acts is no longer limited, by fears of unconstitutionality, to acts in which the State is involved or which are done under color of law. So, too, these cases make it clear that the congressional power under section 5 of the Amendment extends to all rights secured or granted by the Federal constitution, not just to those arising from exercise of the substantive powers of the Federal government.

In these respects, the doubt created by this Court's division in *United States v. Williams,* 341 U.S. 70, has been resolved, and the constrictive grip of *The Civil Rights Cases,* 109 U.S. 3, 11-12, 25, has been loosened, as at least six justices of this Court have now agreed. [See, *United States v. Price, supra,* 383 U.S. at 797-801, 805-806; and *United States v. Guest, supra,* 383

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gress has enacted legislation proscriptive of racial discrimination by private persons in the sale or rental of property, it is clear that under the Supremacy Clause [*U.S. Const.*, art. VI, cl. 2] inconsistent or conflicting state legislation must give way. [*Katzenbach v. Morgan, supra*, 384 U.S. at 646-647; *Testa v. Katt*, 330 U.S. 386, 391; *Buchanan v. Warley, supra*, 245 U.S. at 74.] Congress has enacted such legislation—the Civil Rights Acts of 1866 and 1870, which, in relevant part exist today. [42 U.S.C.A., sees. 1981, 1982. And see, pp. 57-61, *infra*.]

Second: Prohibition of private racial discrimination in respect of the acquisition and enjoyment of property is an appropriate means of enforcing section 1 of the Fourteenth Amendment, notwithstanding the section's prohibitions operate directly only upon the States. [*United States v. Guest, supra*, 383 U.S. at 761-762, 783-784; *Katzenbach v. Morgan, supra*, 384 U.S. at 649-653.] The Amendment "granted the right to be free of racial discrimination . . ." [*Terry v. Adams, supra*, 345 U.S. at 468.] Certainly, it "secured" the right, which is enough to justify appropriate enforcement legislation. [See, *United States v. Guest, supra*, 383 U.S. at 778-779.] That treatment of the right, as we have said, imports a policy to rid the nation of the divisive and other injurious consequences of such discrimination. [See, p. 40, *supra*.] So far as concerns the victim of racial discrimination, the Amendment cer-

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U.S. at 761-762, 781-784.] The same may be said of other cases ante-dating *Price* and *Guest*, and in which, therefore, there may be found dialectical support for the argument that Congress is limited to legislating in respect of conduct in which the State is involved. [See, *e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 31-33; *United States v. Williams, supra*, 341 U.S. at 77-78; *United States v. Cruikshank, supra*, 92 U.S. at 554.] They, too, have been sapped of vital force in this respect by the cases decided at last term.

tainly aims at securing to him a right that will largely, if not indeed fully, shield him from the personally harmful and humiliating effects that ensue upon being subjected to racial discrimination. The effects may be, they have been, produced by private discrimination. The socially undesirable evils that ensue are the same, whether the conduct be that of the State or the voluntary act of private individuals. [*Cf., Burton v. Wilmington Parking Authority, supra,* 365 U.S. at 724-725.] In either event, full achevement of an important objective of the Amendment is obstructed. Legislation seeking to remove or prevent the obstruction is an appropriate means of achieving the object the Amendment has in view.

The power of the Congress to enact such legislation is the power, granted by section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of this article." Enforcement may appropriately extend to the broad aims or objects of the Amendment as well as to its strict letter. That is shown by *Guest, supra,* 383 U.S. 745, in which the provisions "of this article" with which this Court was concerned, secured rights only against state action. Nonetheless, at least six justices of the Court recognized that legislation against conduct that did not include state action was an appropriate means of enforcing the provisions "of this article." [*United States v. Guest, supra,* 383 U.S. at 761-762, 774-777, 781-784.] The same must be true of the "right to be free of racial discrimination"—a right that surely is on a parity with the right to travel, which was the one specifically involved in *Guest.*

Third: Under the Congressional legislation, all people are guaranteed the same right to make contracts and

to purchase, hold and lease real property as is enjoyed by white citizens. [42 U.S.C.A. secs. 1981, 1982.] This guarantee imports, indeed for its effectiveness it must mean, that all conduct destructive of it is banned.[32] The history of this legislation, the conditions that brought it into being, the goal it was designed to reach, give ample assurance of the congressional purpose to reach private conduct that had the effect of impairing or frustrating constitutional rights:

The original Civil Rights Acts were, of course, part of the reconstruction of the South at the end of the Civil War. The oppressive actions to which the newly freed Negro was subjected in the states of the former Confederacy, and to the curbing of which the Acts were directed, were not alone, or even primarily, the acts of the states. "It was perfectly well known that the great danger to equal enjoyment by citizens of the rights, as citizens, was to be apprehended not altogether from unfriendly State legislatures, but from the hostile action of corporations and individuals in the States . . ." [*United States v. Guest, supra,* 383 U.S. at 783 (fn. 8), quoting Harlan, J., dissenting in *The Civil Rights Cases, supra,* 109 U.S. at 54.] And, so, it was these private acts that sought to continue the Negroes' subjugation—acts such as economic reprisals and the terrorism of the night-riding Klu Klux Klan—to which the Civil Rights legislation was directed. [see, *United States v. Price, supra,* 383 U.S. at 800-802; *United States v. Mosley, supra,* 238 U.S. at 387-388;

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[32] *Cf.*, the analogous construction given by this Court to other parts of the Civil War statutes, *e.g.*, 18 U.S.C.A. secs. 241, 242 in *United States v. Price, supra,* 383 U.S. at 800-801; *Virginia v. Rives,* 100 U.S. 313, 318. See, also, *United States v. Guest, supra,* 383 U.S. at 777 (Brennan, J., concurring and dissenting); *United States v. Mosley,* 238 U.S. 383, 386-388.

United States v. Williams, supra, 341 U.S. at 73, 75-77.] These constituted the evil at which the Congress was aiming. These were the reasons why the successive Civil Rights Acts were not limited merely to official conduct or conduct carried on under color of law, but embraced all conduct having the feared destructive effect upon constitutional freedoms.[33]

The language of the congressional enactment brooks of no limitation to conduct carried on under authority or color of law; other provisions deal with that. [*e.g.*, 42 U.S.C.A., sec. 1983; 18 U.S.C.A., sec. 242.] There is no qualification of the full sweep of the words used. Those words are broad enough to include, as they were intended to include, private conduct. It is inconceivable, the depredations of the Ku Klux Klan being then up-

[33]At first, the "Black Codes" of the Southern States imposed official discrimination upon the supposedly freed Negro. But the Reconstruction Acts, which were adopted in 1867, had by 1868 put Southern legislatures pretty largely under the domination of the Freedmen and the Radical Republicans and their sympathizers (the so-called "carpetbaggers" and "scalawags"). The kind of legislation to be expected from legislatures so dominated was not a live threat to the Negro. The immediate and real threat, at the time, was the reaction of the Southern conservatives to the Radical Republican reconstruction policy. That reaction took the form of private suppression of the Negroes, best typified by the familiar story of the rise and terroristic reign of the Ku Klux Klan. [Generally, see: Dulles, *The United States Since 1865* (U. of Mich. Press, 1959) pp. 5-28; *The Columbia Encyclopedia* (3d ed. Columbia Univ. Press, 1963); article "*Reconstruction*," pp. 1775-1776; *United States v. Price, supra,* 383 U.S. at 800-802.] The first Civil Rights or Enforcement Act, after ratification of the Fourteenth Amendment, was the one of 1870. [Act of May 31, 1870, 16 Stat. 141.] By then, the States, as such, were not in official opposition to the Reconstruction policy of equality for the Negro. The private opposition to that policy, however, was riding hard to burke it. The Act of 1870 was meant to enforce the Fourteenth Amendment and to make its guarantees a reality. To accomplish that purpose in the existing circumstances, private conduct had to be reached.

permost in the congressional mind, that the words would have been so qualified as to leave the terroristic Klansmen beyond the law's reach. [*United States, v. Price, supra,* 383 U.S. at 805.]

The enforcement legislation, as this Court has but recently emphasized [see, pp. 55-56, *supra*], dealt with all Federal rights, and with any conduct that might have the practical effect of denying them to those whose newly won liberty the Congress was being careful to protect. That legislation means now what it meant then. The meaning to reach private conduct is clear now, as it was then. It cannot now be construed so as "to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." [*United States v. Mosley, supra,* 238 U.S. at 388; *United States v. Price, supra,* 383 U.S. at 801.]

The right to acquire and enjoy property is a right secured by the Fourteenth Amendment. It is guaranteed against *all* destructive conduct, private as well as official, by the Civil Rights Acts. [42 U.S.C.A., secs. 1981, 1982, 1985(3); 18 U.S.C.A., secs. 241, 242.] The statutory guarantee is part of Congress' great design to achieve civil and political liberty for the Negro. Its language must be naturally read; and so read, it is not confined to a guarantee against state action only. [See, pp. 58-59, *supra.*]

The Act thus necessarily imports proscription of conduct that for reasons of racial discrimination impairs or frustrates the right to acquire and enjoy property. The conduct here complained of is of that sort. The right to engage in it is defended by the authority of a legislative act of the State of California. That Act per-

mits and authorizes what the Civil Rights Acts proscribe. [See, pp. 23-39, *supra.*]

Section 26 is thus seen to be in direct opposition to Federal policy. It permits or authorizes that which the Federal statute prohibits. The state statute is being used to just that end. The respondents here were denied housing accommodations because of their race. To justify and legitimatize that conduct petitioners invoke section 26. If that effect is given to the section it is obvious that conduct proscribed by the Civil Rights Acts of 1866 and 1870 has been made lawful. The Supremacy Clause cannot be so readily evaded. [Cases cited, p. 56, *supra.* Also, *cf., Pennsylvania v. Nelson,* 350 U.S. 497, 502-510; *Hamm v. Rock Hill,* 379 U.S. 306, 308-312.]

2. Petitioner's Discriminatory Conduct Was Done Under Color or Pretense of Law and in That Respect Is Contrary to the Civil Rights Acts.

Even if some state involvement is needed to make the Civil Rights Acts applicable [see, *Monroe v. Pape,* 365 U.S. 167, 171; *Civil Rights Cases, supra,* 109 U.S. at 11-12, 25. But, *cf., Heart of Atlanta Motel v. United States,* 379 U.S. 241, 250-252] that involvement exists in the instant case. What petitioners have done was done under "color of law" and that is enough to bring their conduct within the reach of the Civil Rights Acts.[84] To be done under color or pretense of law an act need not be only an authorized or official act of the State. [*Ex parte Virginia,* 100 U.S. 339, 347; *Wil-*

[84] "Color of law" includes "pretense of law." [*Screws v. United States, supra,* 325 U.S. at 111; *Baldwin v. Morgan,* 5 Cir., 251 F. 2d 780, 786-787; *Valle v. Stengel,* 3 Cir., 176 F. 2d 697, 701.]

liams v. United States, 341 U.S. 97. *Cf., Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 283-286, 287-288; *United States v. Price, supra*, 383 U.S. at 793.] It is enough that it is a use, or even misuse, of power possessed by virtue of state law and made possible because the actor is clothed with the authority of state law. [*Monroe v. Pape, supra*, 365 U.S. at 185; *Screws v. United States, supra*, 326 U.S. at 109, 112, 121-122.] It is immaterial in this regard that the actors are not officers of the State. [*United States v. Price, supra*, 383 U.S. at 794, 805-806.]

The right to discriminate has been made a constitutional right in California by section 26. [See, pp. 23-28, *supra*.] One who exercises that right, therefore, and seeks to avoid any sanctions on account of it, does so by virtue of a power possessed under and authorized by state law. Without the immunizing effect of section 26, an owner of residential property in California could not lawfully refuse to sell, rent or lease it on grounds of race or color. [See, pp. 15-16, *supra*.] Because of that section, however, owners of residential property are free to refuse to sell, rent or lease on such grounds. The legal power so to act is theirs only because of the power or immunity conferred by section 26. The justification for it in law is asserted under and by virtue of the section. Their action, therefore, is taken under color or pretense of law.

Furthermore, in "cases under §1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment . . ." [*United States v. Price, supra*, 383 U.S. at 794 (fn. 7).] We have shown that "state ac-

tion" in the now accepted sense exists in respect of section 26. [See, pp. 29-39, *supra.*] That being so, the constitutionality and applicability of 42 U.S.C.A., sees. 1282, 1283, are established. Thus, it becomes immaterial whether rights against an individual, rather than only the State, are secured by the Fourteenth Amendment. It is enough that the state legislation, as here sought to be applied against the respondents, is inconsistent with a valid Federal statute.

VI.

The Court Below Properly Held That the Power of the State's Judicial System Could Not Be Enlisted to Enable One in the Rental Business to Carry Out That Business in a Racially Discriminatory Manner.

In the *Snyder* case, the petitioner Snyder, by his cross-complaint prayed for a judgment declaring that he "has a right to have a court of law recognize and enforce the termination of [Prendergasts'] tenancy . . . even if [his] sole reason for so terminating and for seeking such court recognition of the same were the race of [respondent] Wilfred J. Prendergast." [R. 66.] The trial court was of the view, and the State Supreme Court, as an alternative ground of decision, agreed [R. 74-78, 84], that this invocation of the court's aid in enforcing Snyder's discriminatory purpose was beyond the court's constitutional power, because an earlier California decision [*Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242, 22 Cal. Rptr. 309] had applied to such a situation the doctrine of this Court's decision in *Shelley v. Kraemer, supra,* 334 U.S. 1.

This Court said in *Shelley,* that the Fourteenth Amendment "makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs or judicial or executive proceedings . . ."

The principle thus enunciated is a complete answer to the petitioners' challenge of the decision below in *Snyder.* Petitioners' challenge, indeed, is not to the applicability of the *Shelley* doctrine to the Snyder facts, but is an attack on *Shelley.* It amounts to little more than several variations on the theme that *Shelley* was wrongly decided.

They argue in that connection that *Shelley* should not be permitted to go beyond the case of a willing buyer and seller who would be compelled against their wills, by judicial enforcement of a racial covenant, to discriminate. [*Br.,* 54-55.] What is ignored in that argument is that it is the purpose of the Fourteenth Amendment to protect the individual against racial discrimination by the State; and, that, when the State aids or enforces such discrimination through the processes of its courts, it is the State acting governmentally that imposes the discrimination upon the unwilling victim. That victim, has a constitutional right, as this Court said in *Terry v. Adams, supra,* 345 U.S. 468, "to be free of racial discrimination . . ." As Mr. Chief Justice Vinson later explained *Shelley* (in which he wrote this Court's opinion), this Court "held that such judicial action which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of 'equal protection.'" [*Barrows v.*

Jackson, 346 U.S. 249, 261, Vinson, C.J., diss.] That is the real thrust of *Shelley*—the effect of the court's action, enforcing discrimination, upon the person whom the Fourteenth Amendment protects against the State.

Also ignored in petitioners' argument is the significance of *Barrows v. Jackson, supra,* 346 U.S. 249. What was sought from the court there, was not compulsion of a discriminatory choice by one who wanted to make a nondiscriminatory one, but damages by one party to the covenant for the other's breach of it. But, this Court had no difficulty in upholding the state court's refusal to grant the requested relief. This, because of the effect such judicial relief would have in continuing and encouraging racial discrimination by others against those the Amendment protected from racial discrimination by the State.

The thrust and sweep of *Barrows* is, perhaps, best understood by a consideration of Mr. Chief Justice Vinson's dissent, which has unusual significance because of his authorship of the Court's opinion in *Shelley.* The Chief Justice said [346 U.S. at 267]: "The suit is directed against the very person whose solemn promise helped to bring the covenant into existence. The plaintiffs ask only that respondent do what she in turn had a right to ask of plaintiffs—indemnify plaintiffs for the bringing about of an event which she recognized would cause injury to the plaintiffs." And, at page 268: "The Court should not undertake to hold that the Fourteenth Amendment stands as a bar to the state court's enforcement of its contract law." As seen, the Court thought otherwise.

The instant case is, in effect, no different from *Barrows.* Just as the Fourteenth Amendment stands in the way of a state court's enforcing its contract law

when the result of so doing will effectuate racial discrimination, so does it bar a state court from enforcing its eviction laws when the result of so doing will effectuate racial discrimination.

Petitioners urge [*Br.* 60] that to uphold California's refusal to allow its courts to be used to support the business landlord's racially discriminatory rental policy means that "an issue of Constitutional proportions and psychiatric overtones may be presented in virtually every dispute between members of different racial, religious or political groups."

Petitioners protest too much.. The question whether a landlord is evicting a tenant solely by reason of his race, is a question of fact, no more nor less different of ascertainment than if there were a statute which prohibited that conduct and allowed a suit to enjoin it or to recover damages because of it. [*e.g.*, the Unruh Civil Rights Act, fn. 5, p. 8, *supra.*] But petitioners make no contention that such legislation is invalid; and, indeed, it is valid. [See, *Colorado Anti-Discrimination Com. v. Case,* 151 Colo. 235, 380 P. 2d 34; *Massachusetts Com. Against Discrimination v. Colangelo,* 344 Mass. 387, 182 N.E. 2d 595.]

A denial of equal protection to petitioner *Snyder* is asserted by petitioners, because in *Hill v. Miller, supra,* 64 Cal. 2d 757, 415 P. 2d 33, 51 Cal. Rptr. 689, the court below affirmed a judgment denying the tenant an injunction against a threatened eviction.[35] [*Br.*,

[35]What was decided in *Hill* was only that there was no cause of action to compel an owner of a single family residence to rent to another, albeit the reason for not renting is based on race. So long as no enforcement of racial discrimination was asked of the court, the tenant was not being denied equal protec-

(This footnote is continued on the next page)

55-58.] That difference did not depend, as petitioners seem to be complaining, upon an "election among available procedural formalities . . ." [*Br.*, 55.] It came about, because in *Hill* the landlord was not, whereas in *Snyder* he was, seeking the court's enforcement of his racially discriminatory purpose. The difference is not merely the happenstance of the position of the parties on the pleadings. The difference is fundamental. In the one case, the State is involved; in the other it is not. It makes perfectly good sense, as well as being sound constitutional doctrine, for the rule to be that "a State may not enforce racial discrimination." [Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. Law Rev. 473, 491.]

Shelley is not the only case refusing to enforce private rights or claims, because to do so would put the State, through its courts, in the position of abridging a federal constitutional right secured against the State. A good example is *New York Times v. Sullivan,* 376 U.S. 254, an action between private parties, in which it was held that a cause of action under State law for libel could not be enforced, because enforcement would be a deterrent to exercise of the right of free press, secured by the First Amendment as incorporated into the Fourteenth. [See, also, *Time, Inc. v. Hill* (Jan. 9, 1967), ... U.S. .....]

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tion. Judicial enforcement of the discrimination, however, would be another matter. [64 Cal. 2d at 759-760, 415 P. 2d at 34, 51 Cal. Rptr. at 690.]

Conclusion.

The judgments of the State Supreme Court should be affirmed; or, alternatively in *Mulkey*, the writ of certiorari should be dismissed, as improvidently granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Brief of the State of California as Amicus Curiae.

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Brief of the State of California as Amicus Curiae.

Interest of Amicus.

In 1963, a fair housing bill known as "The Rumford Act" passed the California Legislature by margins of 63-9 in the House and 22-13 in the Senate. It followed two anti-discrimination bills—the Unruh and Hawkins Acts—which were passed in 1959.

The Rumford Act sought a partial end to economic housing decisions based solely on race or religion and afforded a means to the eventual eradication of the product of such housing discrimination—the ghettos of poverty and apathy which so readily spawn crime.[1]

[1] *Jackson v. Pasadena City School District*, 59 Cal. 2d 876 (1963) at 881; 31 Cal. Rptr. 606.

". . . Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. . . ."

The Attorney General is "the chief law officer of California."[2] His primary duties are to seek the means by which California's nineteen million residents may live free from crime and unlawful inequities. Toward this end, he can, and does, enforce old laws and encourage the promulgation of new ones. But enforcement and promulgation of individual laws are only effective when people respect and support the general law, and such respect and support is uncontrovertedly weakest in the ghetto. Thus, if we are to minimize crime, we must eliminate the ghetto.[3]

The Rumford Act may well accelerate the ghetto's demise. With the passage of the act, however, a campaign was initiated for its immediate suppression through the device of a constitutional amendment intended not only to nullify the Rumford Act and its predecessors, but also to make the future passage of similar legislation impossible by the state and any of its political subdivisions.

The initiative offered no alternative to the Rumford Act, and destroyed the power of all governmental bodies to legislate against housing discrimination.

The California Supreme Court identified the purpose behind this initiative. Since unconstitutional discrimination now finds sanctuary in our State's Constitution, we are filing this *amicus curiae* brief.

If Article I, Section 26, is upheld; if this Court says that a state court must ignore the unconstitutional reality which spurns seemingly innocuous legislation, then a new avenue of repression will be opened to those in all other states who seek to perpetuate unconstitutional discrimination.

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[2]Cal. Const., Art. V, Section 13.

[3]"A Challenge of Crime in a Free Society" a report by the President's Commission on Law Enforcement and Administration of Justice (United States Government Printing Office, Wash. D.C.) 1967.

ARGUMENT.

I.

The Effect of Article I, Section 26, of the California Constitution Is to Perpetuate Racial Discrimination in Housing in Violation of the Fourteenth Amendment.

Article I, Section 26, of the California Constitution provides:

> ". . . Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease, or rent such property to such person or persons as he, in his absolute discretion, choses."

This carefully drawn language is as innocuous as the language in Alabama Local Law No. 140, which revised the city boundaries of Tuskegee, Alabama. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). It is as devoid of expressing overt racial purposes as the literacy test in Alabama's Boswell Amendment, *Davis v. Schnell*, 81 F. Supp. 872, aff'd without opinion, 336 U.S. 933 (1949), or the abolition of primaries in *Terry v. Adams*, 345 U.S. 461 (1953).

But like the public enactments struck down or criticized in the above cases, the neutrality of Article I, Section 26, is confined to its surface. The California Supreme Court found that behind its bland language lies the same purpose which rendered these earlier pronouncements suspect or unconstitutional: the perpetuation of racial and ethnic discrimination in violation of the Fourteenth Amendment.

Petitioners now insist the decision to sponsor Proposition 14 was born of reasons not confined to race and ethnic groups.

> "The measure establishes non-regulation by the State over conduct in the rental or sale of residential property by its owners not only when based on racial or religious discrimination but when done for any reason or for no reason at all. Thus, the Section forbids governmental restrictions upon the privilege of residential property owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance, or whatever. . . ." (Br. for Petners, pp. 17-18.)

The campaign for Proposition 14's passage was not consistent with this disclaimer.

The purpose was so clear to the majority of the California Supreme Court that they dismissed any allegations to the contrary in two sentences:

> "Proposition 14 was enacted against the foregoing historical background [of housing legislation] with the clear intent to overturn state laws that bear on the right of private sellers and lessors to discriminate, to forestall future state action that might circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." *Mulkey v. Reitman*, 64 Cal. 2d 529, 534-35 (1966); 50 Cal. Rptr. 881.

The Justices of the California Supreme Court lived through the heated campaign over Proposition 14, and recognized the reality which lay behind the proposition's

language. This reality was also apparent from the official arguments on Proposition 14 submitted to the voters, which petitioners attach in the appendix to their brief. (Appen. pp. 3-4.) After stating that:

> "Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish without interference by state or local government,"

the proponents immediately launched an attack upon the Rumford Act:

> "Most owners lost this right through the Rumford Act in 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry."

Their conclusion is of particular import:

> "Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.
>
> "Your 'Yes' vote will end such interference. It will be a vote for freedom."

The argument concentrates on the Rumford Act and the need to prevent similar legislation. It also makes specific reference to minority groups, although none of these subjects appear in the body of the initiative or its official legislative analysis.[4]

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[4]See XLIV California Real Estate Magazine No. 11, Sept. 1964.

The only "right" taken away by the Rumford Act was the "right" to discriminate on the basis of race, color, religion, national origin and ancestry.[5] The Rumford Act was referred to as the Rumford *Forced* Housing Act. The proponents did not seek a simple repeal of the Rumford Act. Nor did they merely seek to abolish existing fair-housing enactments. They sought further and most importantly to preclude any future considerations of this issue by the duly elected representatives of the State, county and city governments.

These purposes are not apparent from a simple perusal of the language used in the initiative. However, this court has had no difficulty in discerning the true objectives of sophisticated legislation. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the mode was a sophisticated revision of the city boundaries of Tuskegee, Alabama. On its face, Alabama's Local Law 140 displayed no discriminatory purpose. But the petitioners averred that the newly created boundaries would eliminate all but a few of the city's Negro voters, while retaining all its white voters. This Court held that,

> "if these allegations remained uncontradicted or unqualified, the conclusion would be irresistible, . . . that the legislation is solely concerned with segregating white and colored voters by forcing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* at 341.

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[5]Art. I, § 1, Cal. Const.

In *Davis v. Schnell*, 81 F. Supp. 872, aff'd without opinion, 336 U.S. 933 (1949), the means was a literacy test adopted as the "Boswell Amendment" by the people of Alabama. Again, the words revealed no discriminatory purpose. But, the district court noted:

> ". . . while it is true that there is no mention of race or color in the Boswell Amemdnent, this does not save it [since] . . . it clearly appears that amendment was intended to be and is being used for the purpose of discrimination against applicants for the franchise on the basis of race or color." *Id.* at 880.

In *Anderson v. Martin*, 375 U.S. 399 (1964) this court in reviewing a statute which provided for the race of all candidates for public office be placed on the ballot declared that:

> "[In] the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which a racial prejudice may be so aroused as to operate against one group because of race . . ." *Id.* at 402, 403.

This case presents an analogous situation. The enactment purported to be a lawful exercise of legislative power, and was not discriminatory on its face; but in reality it is a state supported vehicle for the exercise of private discrimination.

Petitioners question the California Supreme Court's finding of the discriminatory purpose of Article I, Sec-

tion 26, and ask this Court to overrule that finding. The long history of California has been replete with examples of discrimination in housing; many of the neighborhoods of its largest cities have become non-white by custom and legal sanction.[6]

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[6]In Los Angeles County in 1960, 334,916 Negroes out of a total Negro population of 461,546, lived within the central district of the City of Los Angeles. Another 36,291 Negroes lived in a highly segregated unincorporated area contiguous to the City's central district. About 62,720 Negroes lived in 67 other incorporated cities within the county but of that number 59,022 Negroes lived in segregated areas of Long Beach, Pasadena, Compton, Santa Monica, and Monrovia. The remaining 3,718 Negoes lived in 62 cities within the county having a combined population of 1,829,907. (Report of the Los Angeles Human Relations Commission, March 1963.)

In 1965, the McCone Commission Report found that 88.6% or 575,900 of the countys' 650,000 Negroes lived within the 46 square mile curfew area of the Watts Riots. The total area of Los Angeles County is 452 square miles (p. 75 [1966]). *"Violence in the City—An End or a Beginning"* Report of California's Governor's Commission on the Los Angeles Riots, December 1965; see *Social Profiles: Los Angeles County*, by Ed Freudenberg and Lloyd Street (Los Angeles Welfare Planning Council Report No. 21, 1965) pp-scd-sc 15; *Background for Planning* by Marchia Meeker with Joan Harris (Los Angeles Welfare Planning Council Report No. 17, 1964), pp. 54-62 and Tables VII, VIII, IX, X and XI.

In San Francisco, while the total population has shown a slight decrease from 740,300 in 1960 to 740,200 in 1965, the non-white population has increased from 18.4% in 1960 to 22.8% in 1965. And 21.1% of the Negro population lives in three census tracts where the percentage of Negroes approaches 70%. (Fair Employment Practice Commission of California Memo. No. 33, 1966.)

In Oakland, California, 77% of the Negroes living within that community live in four target areas of the Anti-poverty Program that have a high concentration of housing, health and job problems.

During the period from 1960 to 1965, Alameda County, where the City of Oakland is located, had a population increase of 148,000 people and 115,000 of that number were located in the white suburbs in the southern part of the county. Oakland's population remained constant: 381,350 in 1960, 386,186 in 1965. However, 30,000 whites have moved out of the city and were replaced by 30,000 Negroes. The percentage of Negroes liv-

In their brief, petitioners emphasize that this is a suit between individuals, who are merely exercising their constitutional right to discriminate. Any theoretical argument that the petitioners possess such a right was removed by the passage of the Rumford and Unruh Acts. If petitioners possess such a right to discriminate on the basis of race or religion, it arises *only* because of Article I, Section 26. Clearly, the State is substantially involved in the present acts of discrimination, because without Article I, Section 26, petitioners would possess no right to discriminate on the basis of race or religion.

Article I, Section 26 does more than make the State neutral in matters of discrimination in housing. It purports to give legality to every act of racial discrimination committed by a property owner in the sale or rental of real property.

Far from acting as "neutral" in this instance, the State is actually declaring that henceforth no fair-housing acts can be passed by the state Legislature or any cities, counties, or political subdivisions. This constitutional barrier to such legislation or enactment of ordinances by local entities in the fair-housing field constitutes an affirmative stand by the state electorate against fair-housing enactments contrary to the Fourteenth Amendment of the United States Constitution.

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ing in Alameda County is 14% while the percentage in Oakland is 30% and in Berkeley 20.6%. In the southern part of the county the percentage of Negroes is only 0.1%. (Report of Fair Employment Practice Division, Memo. No. 33, 1966.)

Finally, in San Diego County 82% of the Negroes residing there live in 10 of the 123 census tracts, while 84 tracts have fewer than nine Negroes and 32 tracts have no Negroes. (Governor's Advisory Committee on Housing Problems, Report on Housing in California, 38, 1963.)

If the measure had merely repealed the Unruh and Rumford Acts, the state Legislature and other political subdivisions of the state would have been free to enact or refuse to enact such legislation. Then a state of neutrality would have existed. However, this enactment not only cancels the effectiveness of the existing state legislation but also precludes cities, counties and other political sub-divisions which have legislative power within their own jurisdictional boundaries[7] from passing fair-housing legislation even though such localities might desire to legislate to meet local problems. Article I, Section 26, "stagnates" or "freezes" their power to enact fair-housing ordinances.

II.

The Enactment of Section 26 Was Itself Prohibited State Action in Violation of the Fourteenth Amendment Because It Was an Abdication of a Traditional Governmental Function for a Racially Discriminatory Purpose.

The California Supreme Court determined that the State was significantly involved in, and responsible for, the acts of racial discrimination in this case. Amicus curiae further submits that the enactment of section 26

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[7]Article XI, Section 11, of the California Constitution reads as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In 40 Ops. Cal. Att'y. Gen. 114 (September 1962) prior to the enactment of the Rumford Fair-Housing Act, it was concluded that as of that date the State of California had not preempted the field with respect to discrimination in housing and, thus, local entities could enact fair-housing ordinances. Thus, a mere repeal of the Rumford Act would have created the situation where local entities could have enacted fair-housing ordinances.

was itself prohibited state action in violation of the Fourteenth Amendment because it was an abdication of a traditional governmental function for an impermissible purpose.

The electorate's enactment of a state constitutional amendment is "state action" in its most fundamental form; the product of such enactment is subject to the limitations imposed by the Constitution of the United States, *Lucas v. Forty-fourth General Assembly*, 377 U.S. 715, 736-737 (1964).

The ability to determine whether to legislate in a given area is undeniably a fundamental governmental function. By virtue of the enactment of Article I, Section 26, all levels of California government were forced to abdicate this basic function for the purpose of permitting private racial and religious discrimination in the transfer of real property. Minority groups are therefore precluded from presenting their grievances about, and seeking redress for, such racial or religious discrimination to the governmental bodies of the State of California. This denial of access to the Legislature violated the Fourteenth Amendment.

Furthermore, the disability superimposed by section 26 was limited to one aspect of property rights, the right to sell, lease, or rent real property. It was enacted at the expense of an equally important aspect of property rights, the right to acquire and possess real property.[8]

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[8]*Cf. Barbier v. Connolly*, 113 U.S. 27, 32 (1885); *Shelley v. Kraemer*, 334 U.S. 1 (1948); Article I, Section 1, California Constitution which reads as follows:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defendang life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Section 26 constituted a grant of virtual immunity to persons who would vent racial and religious discrimination against those seeking to exercise their right to acquire property on an equal basis in an open market. As this Court noted in *Truax v. Corrigan,* 257 U.S. 312, 333 (1921):

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal right or a property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted to work against, a larger class."

This Court is familiar with previous attempts by states to effectuate private racial discrimination while purportedly becoming neutral in an area of traditional governmental concern. The series of cases culminating with *Terry v. Adams,* 345 U.S. 461 (1953)[9] involved an increasingly sophisticated pattern of disenfranchising Negro voters in Texas. The court ultimately found that the racial discrimination in the selection of primary candidates by the Jaybird Association, a voluntary political club uncontrolled by state statute, was violative of the Fifteenth Amendment because it was the basic step in accomplishing exactly what the Fifteenth Amendment sought to prevent. *Terry v. Adams, supra,* at 469-470. The court noted that racial discrimination in county-operated primaries would be unconstitutional and viewed the state's withdrawal from that part of the electoral process as

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[9] *Nixon v. Herndon,* 273 U.S. 536 (1927); *Nixon v. Condon,* 286 U.S. 73 (1932); *Smith v. Allwright,* 321 U.S. 649 (1944).

". . . circumvention, to permit within its borders the use of . . . [a] device that produces an equivalent of the prohibited election." *Id.* at 469.

Similarly, in *Rice v. Elmore,* 165 F. 2d 387 (4th Cir.), *cert. den.* 333 U.S. 875 (1947) and *Baskin v. Brown,* 174 F. 2d 391 (4th Cir. 1949), approved in *Terry v. Adams, supra,* the Fourth Circuit found that South Carolina's abandonment of its traditional role in the primary election for the purpose of permitting racial discrimination by private political clubs was an administration of the state's election laws:

"[i]n such way as to result in persons being denied any real voice in government because of race and color, [and] it is idle to say that the power of the state is not being used in violation of the Constitution." *Rice v. Elmore, supra,* at 391.

When South Carolina further sought to avoid the burden of complying with the equal protection guarantee of the Constitution by shifting even greater control of the primary election to private political clubs, the court again invalidated the scheme, stating:

"The devices adopted showed plainly the unconstitutional purpose for which they were designed; but, even if they had appeared to be innocent, they should be enjoined if their purpose or effect is to discriminate against voters on account of race." *Baskin v. Brown, supra,* at 393.

Manipulations by states to effectuate racial discrimination are not limited to elections. In *Griffin v. School Board,* 377 U.S. 218 (1964), Prince Edward County, Virginia, sought to avoid the result of this Court's holding in *Brown v. Board of Education,* 347

U.S. 473 (1954), by abandoning its traditional role in the educational process. This court, however, readily recognized the purpose for which the county had closed its public schools and found such action violative of the Equal Protection Clause:

> ". . . But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional" *id.* at 231.

Minority groups have no less right to the equal protection of state laws regulating the legislative processes than to those regulating voting or education. Housing discrimination infinitely complicates the school segregation problem which this Court has been trying to solve for over a decade. In addition to causing the victims to live in crowded, expensive, unhealthy, and unsafe conditions, racial discrimination in housing, inflicts a "continuing subjection to public indignity and humiliation" magnified by significant state participation and involvement in the activities of the discriminator.[10]

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[10] "[H]ousing segregation remains as the most serious and least soluble aspect of the race problem, at least in the Northern States.' 'Myrdal, *An American Dilemma* XL-XLI (McGraw-Hill, Paperback ed. 1964).

"Fourteenth Amendment Aspects of Racial Discrimination in 'Private Housing,'" 52 Calif. L. Rev. 1, 28-30 (1964). We are dealing neither with a luxury nor a frill but "a basic aspect of a decent life." *Ibid.*

This Court should not hesitate to strike at the heart of the evil embodied in Article I, Section 26: the total disabling of California government from carrying on their legislative functions for the purpose of effectuating racial discrimination. The determination that the enactment of section 26 denied the equal protection of the laws to those groups who have been subjected to racial or religious discrimination, does not constitute a mandate that a state must take affirmative steps to eliminate such discrimination; rather, it is a recognition that the governmental units vested with the power and duty to legislate must remain free to determine whether it is in the public interest to act or to refrain from acting in this particular area.

The language of Circuit Judge Parker in *Rice v. Elmore, supra,* at p. 392, is apropos to the present case:

> "The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time. Their primary purpose must not be lost sight of, however; and no election machinery can be upheld if its purpose or effect is to deny to the Negro,

on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives."

Section 26 would have effectively accomplished the purposes for which it was enacted: to preclude those persons racially discriminated against in transfer of property from presenting their grievances to the Legislature; to insure that private discrimination would prevail, and to maintain the strict pattern of segregation of the communities in California. Its enactment was an affront to the dignity of the constitutional standards of the Fourteenth Amendment.

Conclusion.

The California Supreme Court was correct in its resolution of this issue and its decision should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL.,

Petitioners,

vs.

LINCOLN W. MULKEY, ET AL.,

Respondents.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL.,

Petitioners,

vs.

LINCOLN W. MULKEY, ET AL.,

Respondents.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Interest of the *Amicus*

The State of New York has been a pioneer in the enactment of fair housing legislation. New York banned discrimination in public housing in 1939,[1] in urban renewal housing in 1950,[2] and in publicly-assisted housing accommodations in 1955.[3] By statutes enacted in 1961 and 1963,

[1] N. Y. Laws, 1939, Ch. 808, § 223, now found in Public Housing Law § 223.

[2] N. Y. Laws, 1950, Ch. 287, now found in Civil Rights Law, Art. 2-A.

[3] N. Y. Laws, 1955, Ch. 341, now found in Civil Rights Law, Art. 2-A; Laws, 1955, Ch. 340, now found in Executive Law § 296, subd. 3.

New York prohibited discrimination in all housing accommodations, private as well as public, with the exception of the rental by the owner of a unit in a two-family house in which the owner or members of his family reside or the rental by an occupant or an owner of a room or rooms in a housing accommodation in which they or members of their family reside.[4]

New York's sister state of California has also taken great strides in recent years in the enactment of legislation to combat discriminatory practices in the sale or rental of housing accommodations.[5] However, California's progress in seeking to provide all citizens with the opportunity to acquire adequate housing was abruptly halted in 1964 by the adoption of Proposition 14 by the California electorate, after a vigorous campaign sponsored by the California Real Estate Association and the California Apartment Owners Association. Proposition 14, which was incorporated into the California Constitution as Article I, § 26, not only has the effect of repealing existing state and local fair housing laws in California, but purports to create a right for any person or corporation to discriminate with "absolute discretion" in the sale or rental of residential property, regardless of the size or scope of the housing accommodation, and "irrespective of how obtained or financed."

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[4] N. Y. Laws, 1961, Ch. 414, as amended by Laws, 1963, Ch. 481, now found in Executive Law § 296, subd. 5.

[5] In 1959, the "Unruh Act" (Cal. Civil Code §§ 51-52) prohibited discrimination by any "business establishment", which was interpreted to encompass all businesses selling or leasing residential housing. See *Burks* v. *Poppy Const. Co.*, 57 Cal. 2d 463, 370 P. 2d 313 (1962). That same year the "Hawkins Act" (formerly Cal. Health & Safety Code §§ 35700-35741) prohibited racial and religious discrimination in publicly-assisted housing accommodations. In 1963, the "Rumford Act" (Cal. Health & Safety Code §§ 35700, et seq.) extended the prohibition against discriminatory practices to private dwellings containing more than four units.

The State of New York views the outcome of this litigation involving the constitutionality of Article I, § 26 of the California Constitution with more than academic interest. We are concerned with the effect that the operation of this section would have on the right of our citizens, who may be members of a minority race or religion, to freely travel to the State of California since we recognize that the constitutional right to travel to other states would be meaningless if our citizens could not obtain adequate housing accommodations at the end of their journey. But of far greater concern is the effect that this litigation may have on the future of fair housing laws throughout the country. It is naive to believe that the recent experience in California, where Proposition 14 was adopted by the electorate despite the active opposition of leaders of both major political parties as well as the leaders of every major religion in the State, could not be repeated in other states. Opponents of anti-discrimination legislation are certain to be encouraged to mount similar campaigns in the wake of their success in California. The rights of members of minorities to secure adequate housing accommodations as well as to obtain equal opportunities for employment and access to public accommodations might well rest on the outcome of this litigation. The time has now arisen in which the public must learn whether the basic needs of citizens in any state may constitutionally be subordinated to the desires of an unconcerned, intolerant majority.

The State of New York, accordingly, files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

Questions Presented

1. Does Article I, § 26 of the California Constitution, which purports to create a constitutional right to discriminate in the sale or rental of interests in real property,

irrespective of the scope of the housing accommodation or the manner in which such property was obtained or financed, violate the Fourteenth Amendment of the United States Constitution?

2. Does Article I, § 26 of the California Constitution abridge Federal rights afforded by § 1982 of Title 42 of the United States Code?

Constitutional Provision Involved

Proposition 14, as now incorporated into the California Constitution as Article I, § 26, provides:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
>
> 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.
>
> 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.
>
> This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or

providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable."

POINT I

Article I, § 26 of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment.

In considering the constitutionality of Article I, § 26 of the California Constitution, it should be recognized at the outset that this section does more than render inoperative existing fair housing laws and ordinances within the state. If the amendment at issue had as its sole purpose the repeal of certain legislation, it would have been simple enough to limit its language to achieve that result. Instead, it is clear from a reading of § 26 that the object of the Amendment was, as described by the Supreme Court of California in its decision below, to create "a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action be involved*". (R. 20).

This attempt to evade the prohibitions of the Fourteenth Amendment must be deemed to have failed in at least two vital respects. First, the effect of Section 26, the attendant circumstances surrounding its enactment, and the history of state involvement in housing discrimination, reveal that its adoption cannot be considered as an act of neu-

trality by the state as petitioners suggest, but rather constitutes a state attempt to sanction and perpetuate racial discrimination. Second, the application of the right created by § 26 would apply to housing developments and involve situations in which state action necessarily would be involved in violation of the prohibitions of the Fourteenth Amendment.

A. Article I, § 26 is not a declaration of state neutrality, but rather constitutes a state effort to sanction and perpetuate racial discrimination in the sale and rental of housing accommodations.

As is often the case in examining the effect of state legislation in the light of a constitutional challenge under the Fourteenth Amendment, it is necessary to consider first the historical background and attendant circumstances concerning the act in issue. *Griffin* v. *County School Board,* 377 U. S. 218, 231 (1964); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). Here, the right of private discrimination set forth in § 26 must be construed in light of the existing patterns of housing segregation in California and the difficulties that have been encountered by members of minorities in seeking adequate housing accommodations. Such an examination will reveal that only in a historical vacuum can Article 1, § 26 be considered as an act of neutrality by the State of California.

1. The existence of discrimination in the sale and rental of housing accommodations in California.

In 1960, there were approximately 1.3 million non-whites residing in California, of which 883,000 were Negroes[6] who were concentrated principally in the major urban centers of the state.[7]

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[6] U. S. Bureau of Census, *General Population Characteristics,* California (PC (1)-6b), 1961.

[7] U. S. Commission on Civil Rights, 50 States Report, p. 43 (1961).

Approximately 80% of the Negroes living in California's metropolitan areas were found to reside in segregated neighborhoods.[8] Recent studies show that the patterns of segregation are increasing. For example, a 1966 survey by the Bureau of the Census reported that the percentage of Negroes in south Los Angeles has increased from 70% in 1960 to 81% in 1955—*Current Population Reports, Technical Studies,* P-23-17.

The substantial segregation of non-whites in California has been the product of discrimination in the sale and rental of housing. A *Report on Housing in California* issued by the Governor's Advisory Commission on Housing Problems in 1963 revealed that it was practically impossible for non-whites to buy new homes in southern California subdivisions, while in northern California fewer than 100 non-whites had been able to buy homes in unsegregated tracts in a period during which 350,000 new homes were built. The same report noted that "even in San Francisco a survey of recently constructed apartments showed that there were no Negroes in structures containing 97% of the new units and no Orientals in 78%" (Governor's Advisory Commission, *op. cit.,* p. 9).

Petitioners have claimed that the fact that non-whites are substantially less well-housed then whites is not due to discrimination and segregation, but due to the complex factors that make non-whites poorer than whites. Brief for Petitioners, pages 42-43. While there is an element of truth in that statement, it ignores the fact that even where non-whites have the income to purchase homes, they are

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[8] Karl & Alma Taeuber, *Negroes in Cities,* Aldiner (1965), p. 40. A segregation index based upon the the percent of Negroes who would have to move if they were to live at random in metropolitan areas was devised by the authors showing the following figures for major California cities: Los Angeles 81.8%, San Francisco 69.3%, San Diego 81.3%, Long Beach 84.0%, Riverside 83.5%, San Bernadino 84.0%, Bakersfield 87.5%, Fresno 83.9%, Oakland 73.1%

often deprived of the opportunity of doing so due to the erection of discriminatory barriers. Thus, in both Los Angeles and San Francisco, it was found that non-whites earning between $7,000 and $10,000 would probably buy more than twice as many homes priced at $15,000 or higher than they already own as a group if such housing were available to them. Housing and Home Finance Agency, *Potential Housing Demands of Non-White Population in Selected Metropolitan Areas, Table G* (1962). Moreover, since the supply of housing available to non-whites is limited as a result of discriminatory attitudes, the prices they must pay for housing accommodations are generally grossly inflated when compared to equivalent accommodations available to white citizens.

The inevitable result of discrimination in the sale or rental of housing accommodations is the creation of urban ghettos, with all its attendant disabilities. Many of these disabilities have been outlined in the President's 1967 Civil Rights Message to Congress, in the following terms:

> "The result of countless individual acts of discrimination is the spawning of urban ghettos, where housing is inferior, overcrowded and too often overpriced.
>
> Statistics tell a part of the story. Throughout the nation, almost twice as many non-whites as whites occupy deteriorating or dilapidated housing. In Watts, 32.5 per cent of all housing is overcrowded, compared with 11.5 per cent for the nation as a whole.
>
> The environment of most urban ghettos is the same: Inferior public facilities and services—streets, lighting, parks; sanitation and police protection; inferior schools; and isolation from job opportunities. In every sphere of urban life the ghetto-dweller is shortchanged.'"[9]

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[9] *New York Times*, February 16, 1967, p. 28.

Indeed, the California Legislature has itself recognized that "racial discrimination against persons of certain groups in seeking housing" is one of the principal causes of slum and blighted residential areas. See Cal. Community Redevelopment Law § 33039(c).

2. *Segregated housing conditions in California are in part the result of prior state action.*

The existence of racial segregation and housing in California must, in large part, be attributed to the effect of restrictive covenants and to the actions of real estate boards—which have in the past involved support by state and local governments.

The use of racial restrictive covenants limiting the sale or rental of interests in real property to non-caucasians has been prevalent in Los Angeles County since as early as 1902.[10] In 1920, the Supreme Court of California, in an action seeking enforcement of a restrictive covenant against a Negro purchaser, found that restrictions against use and occupancy by non-whites were valid and enforceable. *Los Angeles Investment Company* v. *Gary,* 181 Cal. 680 (1920). During the next three decades (until such covenants were held to be unenforceable by *Shelley* v. *Kraemer,* 334 U. S. 1 [1948]), with the assistance of the California courts, the use of restrictive covenants played a significant role in confining non-caucasians to certain urban areas.[11] By 1947, it was reported that Los Angeles was widely covered by these racial restrictive covenants and that new housing subdivisions were blanketed by them. President's Committee on Civil Rights, *To Secure These Rights,* 68 (1947).

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[10] Hearings before the United States Commission on Civil Rights, Los Angeles, San Francisco, January, 1960, pp. 256-257. (Hereafter referred to as Cal. Hearings.)

[11] Cal. Hearings, p. 257.

Although the State of California licenses all real estate brokers, it has been generally conceded that California real estate agents have been a powerful force in creating and perpetuating patterns of segregation within the State.[12] The California State Advisory Committee of the United States Commission on Civil Rights concluded in 1961 that a large measure of blame for the existence of discrimination in California must be placed on the real estate industry. The Committee stated that:

> "• • • So far as Committee testimony has been given, it would appear that a considerable number of leaders in the real estate industry still continue to support and advance the concepts of segregation in their business. Their actions, in large part, appear to foster continued discrimination in California. In such population centers as Los Angeles and San Diego, the realty boards have no Negro members whatsoever. This is particularly disturbing when it is known that such boards represent the top professional association of real estate brokers and that under State law, their members alone are entitled to use the coveted term 'realtor' in business advertising." U. S. Commission on Civil Rights, *50 States Report*, p. 44 (1961).

In the Palo Alto area, the United States Civil Rights Commission learned that only three of the 600 real estate brokers and salesmen showed property on a non-discriminatory basis.[13]

In addition to the actions of state licensed real estate brokers and the state responsibility in enforcing restrictive covenants prior to the *Shelley* decision, the state, as well as the federal government, had contributed to the existence of segregated patterns by pouring public funds

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[12] See Cal. Hearings, pp. 257, 483 *et. seq.*

[13] U. S. Commission on Civil Rights Report No. 4, Housing, p. 123 (1961).

into housing projects which openly discriminated against non-white citizens. The San Francisco Housing Authority had adopted a policy in 1942, which, until it was enjoined from continuing its discriminatory practices pursuant to court order obtained in *Banks* v. *Housing Authority*, 120 Cal. App. 2d 1, 260 P. 2d 668, cert. denied 347 U. S. 974 (1954), provided that:

> "In the selection of tenants for the projects of this Authority, this Authority shall act with reference to the established usages, customs and traditions of the community * * * and *shall not insofar as possible enforce the commingling of races* * * *." (Emphasis added) 260 P. 2d at 671.

With respect to assistance furnished by the Federal Housing Authority, an FHA official stated that of the 125,000 FHA assisted housing units built from 1950 to 1954 in the Los Angeles area, only 3,000 units were available for purchase by non-whites.[14]

In addition to the actions already described, the State of California has in the past specifically barred certain minorities from acquiring particular interests in real property. Thus, in 1879, California adopted a constitutional provision authorizing the delegation of power to localities to zone Chinese into particular areas, or to remove them completely from the limits of cities and towns. California Constitution, Article XIX (1879). This constitutional provision was not repealed until 1952. The California Legislature also enacted an Alien Land Law in 1920 (Cal. 1 General Laws, Acts 260-261) which prevented aliens who were ineligible for citizenship from acquiring interests in real property. It was repealed in 1950.

It should be pointed out that the above is not intended to single California out by way of condemnation for the existence of segregated housing patterns. This same criti-

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[14] Cal. Hearings, p. 258.

cism could probably be leveled at most states in this union. Nor has California shirked its responsibility in seeking to correct this situation as shown by the passage of their Legislature in recent years of the Unruh, Hawkins and Rumford Acts, *supra*. But the responsibility to eliminate the evils of housing discrimination is a continuing one and cannot be ignored as the proponents of Proposition 14 have contended by repealing fair housing ordinances and restoring the State to a position of neutrality—for which there is no historical basis.

3. *The myth of state "neutrality".*

In view of the above factors which have created segregated housing patterns throughout California, it is absurd to contend that the repeal of existing fair housing laws and ordinances in California and the creation of a right to discriminate with impunity in the sale or rental of residential housing will involve an act of neutrality by the state. If non-white citizens in California were unable, as has been shown, to obtain housing accommodations except in urban ghettos prior to the recent enactment of state anti-discrimination statutes, the repeal of these laws and the creation of an absolute right to discriminate means the restoration of the same barriers these citizens have previously faced in seeking decent shelter.

The effect of Article I, § 26, will be to prevent the California Legislature from taking any future action to break down segregated housing patterns and to relieve the attendant evils that arise in urban ghettos. It would not only bar the Legislature from seeking to ameliorate the problems faced by members of minorities in acquiring decent housing, but would prevent the California courts from any extension of common-law policies in this area. In this regard, it should be noted that the Superior Court in Sacramento County, in the case of *Ming* v. *Horgan* (No. 97130), June 23, 1958, 3 Race Rel. L. Rep. 693), held that a Negro could not be excluded from purchasing a new

tract home in a subdivision in the Sacramento area which had obtained FHA and VA insurance solely because of his race—despite the absence of any statutory provision at that time barring racial discrimination in the sale of housing. The Court stated at page 12 of its memorandum opinion:

> "* * * can the courts close their eyes to the inevitable result that if they should uphold defendants in their asserted right of freedom of contract, they would for practical purposes be reverting to a 'separate but equal' rule for those for whom the builders and realtors choose to apply it? * * * If the courts were to * * * accord to builders and realtors the unfettered freedom of contract here contended for, the constitutional guarantees of equal protection and nondiscrimination would be accorded only secondary importance and they would have to recede from a good deal that has been laid down in recent years as fundamental doctrine * * *"

If the right to discriminate which Article I, § 26 purports to provide is held constitutional under Fourteenth Amendment requirements, the issuance of such decisions, as in the *Ming* case, *supra*, would be proscribed in the future.

In sum, the operation of Article I, § 26 can only serve to perpetuate the present patterns of segregated housing and encourage the development of similar patterns in the future. Even if the State or its subdivisions had not been indirectly responsible for housing segregation in the past, it may not by constitutional amendment seek to perpetuate the existence of segregated housing areas. *Cf. Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961); *Taylor* v. *Board of Education of City School District of New Rochelle*, 294 F. 2d 36 (2nd Cir., 1961), cert. denied 368 U. S. 940. Nor may the State encourage, or furnish the vehicle, by which racial prejudice may operate against

any group, whether by express statutory prohibition or by indirection. *Anderson* v. *Martin,* 375 U. S. 399, 402-404 (1964); *Terry* v. *Adams,* 345 U. S. 461 (1953).

Nearly a century ago, this Court, in speaking of the purposes of the Fourteenth Amendment, stated in *Strauder* v. *West Virginia,* 100 U. S. 303, 307-308 (1879):

> "* * * The words of the [fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—*the right to exemption from unfriendly legislation* against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards redueing them to the condition of a subject race." (Emphasis supplied)

Article I, § 26 is, in purpose and effect, an example of the type of "unfriendly legislation" that the Fourteenth Amendment was intended to proscribe.

B. The scope of the right to discriminate conferred by Article I, § 26 would involve state action.

There can be no question that discriminatory State action abridging the right of any person to acquire, enjoy, own and dispose of property is in violation of the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U. S. 1, 10 (1948); *Oyama* v. *California,* 332 U. S. 633 (1948); *Buchanan* v. *Warley,* 245 U. S. 60 (1917). Since it is impossible to fashion and apply a precise formula for recognition of State responsibility under the Equal Protection Clause, this Court has stated:

> "Only by sifting facts and weighing circumstances can the non obvious involvement of the State in pri-

vate conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

The full scope of the right to discriminate conferred by the California amendment at issue cannot help but involve State action in a significant manner.

Although the language in the "Argument in favor of Proposition 14" on the official ballot (Petitioners' Brief, App. 3-5) is subtly phrased to imply that it is only the individual homeowner whom the amendment is designed to protect, it is clear from a reading of the proposition itself that it is the large apartment house corporations and realty developers and real estate agents, who will share in the right to discriminate. Thus, the term "person," who in the amendment is given the right to decline to sell, lease or rent any interest in real property with "absolute discretion," is defined to include "individuals, partnerships, corporations, and other legal entities and their agents or representatives," excluding only the State or any subdivision thereof with respect to property owned by it. The term "real property" is defined to include "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes * * *." Only property acquired by eminent domain, and public places engaged in furnishing lodging, are excluded from the section's application.

The scope of Article I, § 26 is, therefore, broad enough to confer a right of racial discrimination on any privately owned residential development, regardless of its size or the amount of state and federal financial support it has received. In *Peyton* v. *Barrington Plaza Corporation*, 50 Cal. Rptr. 905, 413 P. 2d 849 (Sup. Ct., Cal., 1966), this very right to engage in racial discrimination upon the

authority of Article I, § 26 was asserted by Barrington Plaza, in the City of Los Angeles. Barrington Plaza, the largest apartment development in the western United States, provides apartment living for 2,500 people and includes many retail shops and professional services. The development was part of the urban development program undertaken by the City of Los Angeles, with 90% of its construction costs financed by a $17,000,000 low interest rate loan under the National Housing Act. Defendants' assertion of Article I, § 26 as a defense to a claim for damages by a Negro physician who was refused an apartment in Barrington Plaza was sustained by the Superior Court, but the judgment was reversed by the California Supreme Court on the authority of *Mulkey* v. *Reitman*, 50 Cal. Rptr. 881, 413 P. 2d 825 (1966).

Even in the absence of the *Mulkey* decision, *supra*, there can be no doubt that the creation of a right by Article I, § 26 to engage in racial discrimination, when practiced by a private development such as Barrington Plaza, must be held to contravene the prohibitions of the Fourteenth Amendment. See, e.g., *Burton* v. *Wilmington Parking Authority, supra; Evans* v. *Newton*, 382 U. S. 296 (1966); *Smith* v. *Holiday Inns of America*, 336 F. 2d 630 (6th Cir., 1964); *City of Greensboro* v. *Simpkins*, 246 F. 2d 425 (4th Cir., 1957). As the facts set forth in the opinion of the California Supreme Court point out, Barrington Plaza not only received substantial government financial assistance, but was aided by the State and local governments in receiving zoning changes to accommodate the development. It also received building permits, sold securities, and established shops and professional services all pursuant to State or local approval, cooperation and authority. In line with the reasoning of the above authorities, all these facets of State involvement should prohibit racially discriminatory conduct.

The type of housing development described in the *Barrington Plaza* case, *supra*, is by no means unique in Cali-

fornia today. Many of these housing projects, in terms of their dimensions and functions alone, should be obliged to conform to the same constitutional restrictions as were imposed on the company town in *Marsh* v. *Alabama,* 326 U. S. 501 (1946).

In practice, there are few residential housing projects that cannot be said to depend upon State support in significant involvements. The issuance of corporate charters, the licensing of real estate brokers, the granting of zoning awards, the recording of deeds, and the construction of roads and sidewalks all involve aspects of State action.

Moreover, State action would be involved in any attempt by the California courts to enforce or recognize the right to discriminate accorded by Article I, § 26. Thus, in *Hill* v. *Miller,* 50 Cal. Rptr. 908, 413 P. 2d 852 (1966), an action to restrain a landlord from evicting a Negro tenant, solely because of his race, was dismissed by the Trial Court by virtue of Article I, § 26, prior to being reversed by the California Supreme Court upon the authority of *Mulkey* v. *Reitman, supra.* See also *Prendergast* v. *Snyder,* 50 Cal. Rptr. 903, 413 P. 2d 847 (1966). Here, again, even in the absence of the *Mulkey* decision, the enforcement or sanctioning by the State judiciary of conduct based on racial discrimination would be violative of the Fourteenth Amendment. See *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson,* 346 U. S. 249 (1953).

To attempt to carve out an exception to the "State action" concept by declaring that the right conferred by § 26 shall apply to any interest "irrespective of how obtained or financed" is a meaningless gesture. Clearly, a State constitution may not bind this Court in defining the area in which discriminatory conduct may flourish with impunity. While there may be residential properties in which the extent of State involvement is minimal, the application of § 26 is in no manner confined to that area.

The highest court in California, with the primary responsibility of preserving, where possible, the constitutional

portions of State enactments, found it impossible to differentiate between those portions or applications of the Amendment which might preserve a "proper basis for discrimination" consistent with Fourteenth Amendment requirements (R. 29-31). The language and object of the Amendment leaves no opportunity for severability unless the definition of the right to discriminate sought to be accorded is rewritten by this Court. The entire Amendment must, accordingly, be held invalid as a violation of the Fourteenth Amendment.

POINT II

Article I, § 26 of the California Constitution abridges the privileges of citizens of the United States to reside and acquire interests in real property within the State of California.

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"

The exact nature of the privileges and immunities which are derived from *national* citizenship has been a subject of dispute since the issuance of the opinion of Mr. Justice Miller in the *Slaughter-House cases*, 16 Wall. 36 (1873).[15] However, it is well established that the right to move freely from state to state is an incident of national citizenship

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[15] Prior to the adoption of the Fourteenth Amendment, the privileges and immunities of citizens in the several States were said to include "the enjoyment of life and liberty with the right to acquire and possess property of every kind." *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (1825).

protected by the privileges and immunities clause of the Fourteenth Amendment against state interference. *Crandall* v. *Nevada,* 6 Wall. 35 (1868); *Twining* v. *New Jersey,* 211 U. S. 78, 97 (1908); *Truax* v. *Raich,* 239 U. S. 33, 39 (1915); *United States* v. *Guest,* 383 U. S. 745, 757-759 (1966).

In *Edwards* v. *California,* 314 U. S. 160 (1941), where this Court invalidated a California statute designed to keep indigents from migrating to California, the right of American citizens to enter into and abide in any state served as the basis for the concurring opinion of Mr. Justice Douglas, joined by Justices Black and Murphy. Justice Douglas observed that to permit states to bar indigents from residing within their borders would allow:

> "* * * such an exception to be engrafted on the rights of *national* citizenship * * * [as] to contravene every conception of national unity * * * It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." (p. 181)

A state is not only prohibited from directly interfering with the national right to enter its borders, as in *Edwards* v. *California, supra,* but may not seek to circumvent this right by imposing barriers preventing non-residents from obtaining employment. Thus, in *Truax* v. *Raich,* 239 U. S. 33 (1915), this Court sustained the contentions of a non-resident alien that an Arizona law, which required all Arizona employers of more than five workers to hire not less than 80% qualified or native born citizens of the United States, was invalid. The Court declared that Raich, having been lawfully admitted into the country under Federal law, had a Federal privilege to enter and abide in "any state in the union," and that this privilege to enter and abide in any state carried with it the "right to

work for a living in the common occupations of the community." The Court went on to state that:

> "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country * * * instead of enjoying in a substantial sense and in their full scope the privileges conferred by admission, would be segregated in such of the States as chose to offer hospitality." (p. 42)

Similarly, in *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948), this Court followed the principles stated in *Truax* v. *Raich, supra,* to invalidate a California law barring the issuance of commercial fish licenses to any person ineligible for citizenship. See also *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U. S. 714, 721 (1963).

If a state may not interfere with the national privilege of citizens (as well as aliens) to enter and abide in any state in the union by limiting their right to secure employment, it should necessarily follow that a state may not constitutionally limit their right to secure housing within its borders by laws which sanction, if not encourage, racial and religious discrimination in the sale and rental of housing accommodations.

The enactment of the *Unruh, Hawkins* and *Rumford* Acts by the California Legislature were based upon the recognition of the immense difficulties that have been encountered by members of minority races in obtaining adequate housing in California. The repeal of fair housing legislation and the creation by Article I, § 26 of a "right" to engage in racial or religious discrimination in housing transactions, will necessarily discourage non-whites from

moving to California, will limit the housing opportunities available to non-whites now residing in California, and will tend to confine them to other states and within segregated locales in California itself.

In his concurring opinion in *Bell* v. *Maryland*, 378 U. S. 226, 242 (1964), Mr. Justice Douglas, in declaring that segregation in private restaurants was a "denial of a privilege and immunity of national citizenship", stated (p. 255):

> "Is the right of a person to eat less basic than his right to travel, which we protected in *Edwards* v. *California*, 314 U. S. 160? Does not a right to travel in modern times sink in value materially when there is no accompanying right to eat in public places?"

To the above, we might add: Is not the right to enter into and abide in any state rendered meaningless without a right to obtain housing free from racial discriminatory practices that have been sanctioned by state law?

POINT III

Article I, § 26 is violative of federal rights set forth in § 1982 of Title 42 of the United States Code.

42 U.S.C. § 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The above provision first appeared in § 1 of the Civil Rights Act of 1866 (Ch. 31, § 1, 14 Stat. 27) enacted several months after the adoption of the Thirteenth Amendment. On May 31, 1870, after the ratification of the Fourteenth Amendment, the above section was reenacted as part of § 18 of the Second Civil Rights Act (Ch. 114, 16

Stat. 140) and was recast in its present form in the general statutory provision of 1875 as § 1978 of the Revised Statutes.

Section 1982 was relied on by this Court in *Oyama* v. *California*, 332 U. S. 633 (1948), in holding that the California Alien Land Law, as applied to bar the citizen son of a Japanese alien from inheriting an interest in agricultural land, deprived the son of the equal protection of the laws and of his privileges as an American citizen. Referring to § 1982, the Court noted that (p. 640):

> "By federal statute, enacted before the Fourteenth Amendment but vindicated by it, the states must accord to all citizens the right to take and hold real property."

The Court concluded (p. 647):

> "• • • this case presents a conflict between the State's right to formulate a policy of landholding within its bounds and the right of an American citizen to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin."

A state law may be violative of the rights afforded by § 1982, despite the absence of any express language referring to any race or creed, if the practical consequences of such law limits the opportunities of any class of citizens to acquire property interests. This was true of the statute in question in *Oyama, supra,* as was recognized by Mr. Justice Murphy in his concurring opinion in which he observed:

> "In its argument before us California has disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect. Reference is made to the

> fact that nowhere in the statute is there a single mention of race, color, creed • • • However, an examination of the circumstances surrounding the original enactment • • • and its subsequent application reveals quite a different story." 322 U. S. at 650-651.

Similary, although Article I, § 26 of the California Constitution does not specifically refer to any race or creed, its practical consequences will be to subject the non-white citizens of California to the prejudices of the white majority in acquiring or retaining interests in real property without recourse to any state agency or the courts.

It is obvious that the rights provided by § 1982 may not be abridged by any state statute. However, it must also be remembered that § 1982 was originally enacted pursuant to the authority of Congress to enforce the Thirteenth Amendment. The objectives of Congress in enacting that section were described by this Court in the *Civil Rights Cases*, 109 U. S. 3, 22 (1883), in the following terms:

> "'Congress, • • • by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

Since § 1982 rests upon the authority of the Thirteenth (as well as the Fourteenth) Amendment, its coverage extends to any discriminatory acts which abridge the rights set forth therein regardless of any showing of state ac-

tion. As observed by the court in the *Civil Rights Cases, supra*, at p. 23:

> "Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not • • •"

See also *Clyatt* v. *United States*, 197 U. S. 207 (1905); *United States* v. *Shackney*, 333 F. 2d 475, 486 (2d Cir., 1964).

It should be evident from the above that any agreement or action taken by private sellers or lessors of real property to prevent Negroes from acquiring or leasing property would be violative of the rights set forth in § 1982. Insofar as Article I, § 26 of the California Constitution attempts to cloak individuals and corporations with immunity in discriminating against non-white citizens in the sale or rental of real property, it is an abridgement of the rights provided by § 1982 and, under the Federal Supremacy Clause, cannot be sustained. *Cf. Katzenbach* v. *Morgan*, 384 U. S. 641 (1966).

CONCLUSION

For the foregoing reasons, the decision of the Court below that Article I, § 26 of the California Constitution is in violation of the Fourteenth Amendment of the United States Constitution should be affirmed.

Dated: New York, N. Y., March 3, 1967.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL., PETITIONERS

v.

LINCOLN W. MULKEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the Supreme Court of California in *Reitman* v. *Mulkey* (R. 14–50, 85) and *Snyder* v. *Prendergast* (R. 81–84) are reported at 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P. 2d 825, and 64 Cal. 2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847, respectively. The memorandum decision of the Superior Court of Los Angeles County in *Prendergast* v. *Snyder* (R. 71) is unreported.

JURISDICTION

The judgments of the Supreme Court of California in both cases were entered on May 10, 1966. The petition for a writ of certiorari was filed on August 25,

248-900—67——2

1966, and granted on December 5, 1966 (385 U.S. 967, R. 88).[1] The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part:

> * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 26, of the California Constitution (enacting Proposition 14) provides:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
>
> "Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.
>
> "Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or fam-

[1] A single petition for a writ of certiorari was filed covering both cases.

ilies living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.

STATEMENT

I. THE PROCEEDINGS BELOW

Reitman v. *Mulkey*:

On May 29, 1963, the Mulkeys, who are husband and wife and members of the Negro race, filed a complaint in the Superior Court of California under Sections 51 and 52 of the California Civil Code [2] (R. 2–5).

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[2] Section 51 of the California Civil Code provides:

All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Section 52 of the California Civil Code provides:

Whoever denies, or who aides, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national

They alleged that the defendants, owner and managers of an apartment building in Santa Ana, refused to rent them an apartment solely because of their race and color (R. 3). The prayer was for an injunction restraining the defendants from refusing to rent them an apartment in the building and for $50,000 in general damages and $250 in statutory damages (R. 4).

After the adoption of Proposition 14 (see *infra*, pp. 8–10), on December 23, 1964 the defendants filed a motion for summary judgment requesting that the complaint be dismissed on the ground that Sections 51 and 52 of the California Civil Code, insofar as they were relied upon by the Mulkeys, were inconsistent with Proposition 14. The Mulkeys countered that Proposition 14 violated the federal Constitution and therefore should not bar their action. On January 8, 1965, the trial court, relying on Proposition 14, entered its judgment for the defendants (R. 12). The Mulkeys appealed to the Supreme Court of California (R. 13).

That court treated the case as an appeal from a judgment on the pleadings. It based its decision solely on federal grounds (R. 17, 19, 31). After surveying the background against which Proposition 14 was enacted, the court concluded that it was proposed in response to California's fair housing legislation "with the clear

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origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right" (R. 18). Rejecting the Mulkeys' contention that the States have an affirmative duty under the Fourteenth Amendment to prohibit racial discrimination in the sale and rental of housing (R. 21–22), the court viewed the crucial question as whether the State was sufficiently involved in the discrimination practiced by the realtors in this case to fall within the proscription of the Fourteenth Amendment (R. 20). After reviewing a series of decisions of this Court—*Shelley* v. *Kraemer,* 334 U.S. 1; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Marsh* v. *Alabama,* 326 U.S. 501; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461; *Nixon* v. *Condon,* 286 U.S. 73; *Evans* v. *Newton,* 382 U.S. 296; *Robinson* v. *Florida,* 378 U.S. 153; and *Anderson* v. *Martin,* 375 U.S. 399—the California court concluded (two Justices dissenting) (R. 27):

> The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted * * *. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. * * *

The judgment of the trial court in favor of the de-

fendants was accordingly reversed. A petition for rehearing was denied on June 8, 1966 (R. 86).

Snyder v. *Prendergast*:

The Prendergasts are husband and wife. Mr. Prendergast is Negro; Mrs. Prendergast is Caucasian (R. 51). In July 1964 Mrs. Prendergast rented an apartment on a month-to-month tenancy in a building located in Los Angeles owned by Clarence Snyder. She took up residence in the apartment by herself while awaiting the transfer of her husband, who was working in San Francisco. In October 1964, while Mr. Prendergast was temporarily in Los Angeles, he met Margaret Keefer, a realtor representing Mr. Snyder (R. 52). In November, Mr. Prendergast moved into the apartment with his wife. On December 1, the Prendergasts received a notice purporting to terminate their tenancy and giving them 30 days in which to leave (R. 53, 55).

On December 23, 1964, the Prendergasts filed a complaint in the Superior Court of California alleging the above facts and asking for an injunction restraining the defendant from evicting them and from discriminating on the basis of race in renting apartments in the building in which they lived (R. 51–55). The defendant filed a cross-complaint and moved for summary judgment (R. 58, 63–66), asserting that he was entitled to terminate the Prendergasts' tenancy even if his sole reason for doing so was the race of Mr. Prendergast (R. 65–66).

On March 15, 1965, the trial court filed an order denying the Prendergasts' motion for a preliminary injunction and the defendants' motion for summary

judgment (R. 71). On the same day the court filed a memorandum opinion (R. 71). The court did not think it necessary to reach the question of whether Proposition 14 was valid, and thus a good defense to the Prendergasts' complaint. Rather, it held that, even if Proposition 14 nullified Sections 51 and 52 of the Civil Code insofar as these sections were invoked by the Prendergasts, the court was precluded by *Shelley* v. *Kraemer, supra,* and *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242, from judicially enforcing a landlord's decision to terminate a tenancy on racial grounds (R. 71–78). On March 31, 1965, the court filed its judgment dismissing the complaint without prejudice and the cross-complaint with prejudice (R. 79–80).

On appeal, the Supreme Court of California described the trial court's decision as follows (R. 83):

> The trial court in the present case concluded that it was bound by the *Abstract Investment Co.* case and, further, that if article I, section 26 [Proposition 14], which was adopted following the decision in that case, could be construed as requiring a court to enforce a landlord's decision to evict a tenant because of race, it could not be given that effect for federal constitutional reasons.

The court continued (R. 83–84):

> Although it appears that the instant case is factually indistinguishable from the *Abstract Investment Co.* case, we are not required to rely upon that case in affirming the judgment

herein. We have held today that article I, section 26, upon which defendant relies for the declaration of his rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (Mulkey v. Reitman, *ante,* p. 1.) For that reason, as well as those relied upon by the trial court, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

A petition for rehearing was denied on June 8, 1966 (R. 87).

II. THE LEGISLATIVE BACKGROUND OF PROPOSITION 14

Prior to the adoption of Proposition 14, California had a comprehensive statutory scheme prohibiting discrimination on account of race, color, religion, national origin or ancestry in the sale and rental of private and publicly assisted housing. In 1959 the California Legislature enacted the Unruh Civil Rights Act, Sections 51 and 52 of the California Civil Code. This Act entitled all persons, without regard to race, color, religion, ancestry or national origin, "to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." It was construed by the California courts to cover real estate brokers and all businesses engaged in selling or leasing residential housing. *Lee* v. *O'Hara,* 57 Cal. 2d 476, 20 Cal. Rptr. 617, 370 P. 2d 321; *Burks* v. *Poppy Construction Co.,* 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P. 2d 313. The Legislature, in 1959, also enacted the Hawkins Act which prohibited racial discrimination in some kinds of publicly assisted housing.

The Rumford Fair Housing Act, Sections 35700–35744 of the California Health and Safety Code, enacted in 1963, superseded the Hawkins Act. It prohibited discrimination on account of race, color, religion, national origin, or ancestry in the sale or rental of private housing accommodations in dwellings containing more than four units. It also gave the State Fair Employment Practice Commission, an administrative body, the responsibility of enforcing the Rumford Act.

Proposition 14 was adopted as a constitutional amendment, through the "initiative process," in the November election of 1964. See Article 4, Section 1, of the California Constitution.[3] Prior to the election, so-called "Ballot Arguments," for and against the proposal, were distributed to the voters at State expense. See Cal. Const., Art. 4, Sec. 1; Art. 18, Sec. 1. Under California law these are acceptable documents for ascertaining legislative intent.[4] Almost the entire "Ballot Argument" in favor of Proposition 14 was devoted to the alleged demerits of the Rumford Act

[3] Under California law, a proposed amendment to the State Constitution may be initiated by the electorate if supported by a certified petition signed by qualified voters equal in number to eight per cent of all votes cast for Governor at the last general election in which a Governor was elected. The Secretary of State is to submit the proposed amendment to the people at the next general election occurring 130 days after he receives the petition. If a majority of the people voting on the amendment approve it, it becomes effective five days after the date of the official declaration of the vote by the Secretary of State.

[4] See *People* v. *Ottey*, 5 Cal. 2d 714, 723–724, 56 P. 2d 193, 197–198; *Beneficial Loan Soc.* v. *Haight*, 215 Cal. 506, 515, 11 P. 2d 857, 860.

(Pet. App. at 4–6). Thus, after reminding the voter that the Rumford Act provides that most home and apartment owners "may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry," the "Ballot Argument" continues:

> The Rumford Act establishes a new principle in our law—that state appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

ARGUMENT

INTRODUCTION AND SUMMARY

1. Proposition 14 licenses invidious discriminations in one of the most vital and consequential activities—the purchase and rental of housing. Indeed, it touches—in our view, aggravates—a problem that has been of constitutional and legislative concern for over a century. Even before the adoption of the Fourteenth Amendment the Thirty-Ninth Congress characterized the right to hold property as one of "those fundamental rights which appertain to the essence of citizenship", "the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery" (*Civil Rights Cases*, 109 U.S. 3, 22). Invoking its power to enforce the Thirteenth Amendment, Congress provided in the very first Civil Rights Act, in 1866, that all citizens of the United States, "of every race and color", shall have the same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * * as is enjoyed by white

persons, * * * any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." Act of April 9, 1866, § 1, 14 Stat. 27. Two months later, the same Congress proposed the Fourteenth Amendment, which was understood as incorporating into the Constitution the guarantees of the Civil Rights Act of 1866.[5] And shortly after ratification of the Amendment, a subsequent Congress expressly reenacted the 1866 provision in the Enforcement Act of 1870. Act of May 31, 1870, § 18, 16 Stat. 144, 146.

The law remains on the statute books today. R.S. § 1978, 42 U.S.C. 1982. The right involved is not a mere abstract privilege to purchase or lease property which is satisfied if Negroes are not absolutely disabled from acquiring property. The constitutional and statutory guarantee includes also an immunity from being "fenced out" of an area on the ground of race. See *Buchanan* v. *Warley, supra; Harmon* v. *Tyler,* 273 U.S. 668; *City of Richmond* v. *Deans,* 281 U.S. 704; *Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson,* 346 U.S. 249. To be sure, despite its absolute language, the existing statute has been held to protect only against State action. *Corrigan* v. *Buckley,* 271 U.S. 323; see *Hurd* v. *Hodge, supra,* 334 U.S. at 29. See, also, *Civil Rights Cases, supra,* at 16–17. But this does not detract from the conclusion that the right to freedom from discrimination in housing has

[5] See *Slaughter-House Cases,* 16 Wall. 36, 70; *Civil Rights Cases, supra,* 109 U.S. at 22; *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369; *Buchanan* v. *Warley,* 245 U.S. 60, 78–79; *Oyama* v. *California,* 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer,* 334 U.S. 1, 10–11; *Hurd* v. *Hodge,* 334 U.S. 24, 32–33; *Takahashi* v. *Fish Comm'n,* 334 U.S. 410, 419–420.

enjoyed a special status under the Fourteenth Amendment. See *Hurd* v. *Hodge, supra,* 334 U.S. at 33.

The fundamental character of the right is reflected in the fact that State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan* v. *Warley, supra*), at a time when enforced segregation in public and private schools was condoned (*Berea College* v. *Kentucky,* 211 U.S. 45; see *Gong Lum* v. *Rice,* 275 U.S. 78, 85–87; *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 344, 349), as it was with respect to transportation (*Plessy* v. *Ferguson,* 163 U.S. 537; see *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.,* 235 U.S. 151, 160) and other activities (*e.g., Pace* v. *Alabama,* 106 U.S. 583). So, also, it is revealing that in the restrictive covenant cases (*Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson, supra*), the Court found prohibited "State action" in the apparently neutral judicial enforcement of private discriminatory agreements—invoking a doctrine which it has declined to follow elsewhere. See, *e.g., Bell* v. *Maryland,* 378 U.S. 226, 328–333 (opinion of Black, J., dissenting). We emphasize accordingly that the Fourteenth Amendment's injunction against discrimination is to be applied strictly to residential segregation and that it is indeed appropriate to search out State action which supports discrimination of this character.

It is relevant to add that housing discrimination on the ground of race or religion or national origin inflicts serious and needless injury without furthering personal liberty in any meaningful way. The right to choose a place to live is a basic one. No one can

gainsay the gravity of the harm that invidiously discriminatory housing practices inflict on the immediate victim and on society as a whole. We need not elaborate here on the evils of a systematic "fencing out" of minorities from reserved neighborhoods and the consequent ghetto. The resulting disadvantages and discriminations—in education, employment and other activities—are sufficiently documented.[6]

There are no legitimate countervailing interests. Indeed, the seller—except for the pressures of his former neighbors—has no real concern about the identity of the buyer. Nor does the absentee landlord personally care about the race or religion or ethnic background of his tenants. Whatever may be said with respect to places of public accommodation (see *Bell* v. *Maryland,* 378 U.S. 226, 245–246, 252–255, 260–283) (Douglas, J., concurring); 312–315 (Goldberg, J., concurring); 342–343 (Black, J., dissenting), real estate transactions normally involve no arguable claim of privacy or freedom of association. Nor is the general interest in preserving a free and pluralistic society affected. On the contrary, a refusal to deal on racial, religious or ethnic grounds more often betrays subservience to group attitudes than robust individuality; liberty is not the loser when the pressures of conformity to prejudice are removed by law.

2. Proposition 14 (incorporated in the California Constitution as Section 26 of Article 1) ordains that—

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[6] See, *e.g.*, U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967) at 20–25. See, generally, McEntire, *Residence and Race* (*Final and Comprehensive Report to the Commission on Race and Housing*) (1960); Abrams, *The City Is the Frontier* (1965); Weaver, *The Negro Ghetto* (1948).

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The constitutional amendment applies to all residential property (except transient hotels) and to all transactions except sales and rentals by the State and its subdivisions of government-owned property. On its face, the provision sanctions racial, religious and ethnic discriminations in real estate dealings. Indeed, viewed against the background of California's existing fair housing laws—which it annulled—and in the light of the arguments advanced in support of the proposal, the State Supreme Court expressly found that this was the "clear intent" of Proposition 14, for which it could "conceive" "no other purpose" (R. 18, 31). The necessary effect of the provision is to withdraw the pre-existing protection against invidious discriminations in the sale and rental of housing, substituting an absolute, affirmative right to engage in such discriminations, and, short of subsequent amendment to the State constitution, to permanently enjoin all official action—whether by the legislature, the executive or the courts, and whether at the State or local level—tending to inhibit such discriminatory conduct. The question is whether a measure with this purpose and effect contravenes the injunction of the Fourteenth Amendment that "No State

shall * * * deny to any person within its jurisdiction the equal protection of the laws." The California Supreme Court thought so. We agree.

The basic vice of the provision, we submit, is that it oversteps the bounds of neutrality. The balance of our brief is devoted to that demonstration. We state the considerations separately, although we believe that the ultimate judgment may be made on the basis of their cumulative impact. In summary, we challenge Proposition 14 on three counts:

(1) Because it does not merely repeal existing fair housing laws, but expressly purports to create an affirmative right to discriminate, which all State officers are enjoined to uphold, the provision gratuitously gives an official imprimatur to invidious private practices. That, we suggest, is a violation of the State's constitutional obligation to abstain from actively promoting offensive discriminations. (*Infra,* pp. 16–26.)

(2) By incorporating Proposition 14 in its constitution, the State has again abandoned the role of observer and entered the arena to support private discrimination. The constitutional haven for Proposition 14, combined with its unequivocal wording, permanently disables all branches of the government—including the legislature itself and all subdivisions of the State—from taking corrective action; and unduly prejudices the opportunity of the affected minorities to invoke the normal political processes. (*Infra,* pp. 26–32.)

(3) Finally, insofar as the provision controls transactions in which the State is involved—albeit not as

the owner of the property—it prohibits State agencies from discharging their constitutional duty to assure against invidious discriminations. While the California Supreme Court has not expressly so construed Proposition 14, the text leaves little doubt of its overbreadth. (*Infra*, pp. 32–47.)

I. PROPOSITION 14 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT PROMOTES INVIDIOUS DISCRIMINATION

We do not argue that the State of California was disabled from repealing its prior housing enactments. Nor do we believe it necessary to decide whether preexisting common law rules bearing on that subject might have been codified in some statutory form. The vice of Proposition 14—as its terms indicate and as its context and setting make the more evident—is that it affirmatively invites and promotes invidious discrimination in the sale and rental of housing. The Supreme Court of California has so assayed and construed it. That court's construction is authoritative here.

We begin with the settled proposition that the State may not promote private discrimination based on race, religion or national origin, even if, in the absence of official involvement, those practices would be beyond the control of the Fourteenth Amendment. Of course, the State cannot compel individuals to engage in such discriminations—*e.g.*, *Buchanan* v. *Warley, supra; Peterson* v. *Greenville,* 373 U.S. 244. But that is not the limit of the prohibition. In some contexts, enforcement of private choices, uninfluenced by official action, is forbidden. *Shelley* v. *Kraemer,*

supra; Barrows v. *Jackson, supra.* And, of particular relevance here, the State may not designedly facilitate the discriminatory conduct of individuals or lend its cooperation to that end. *E.g., Robinson* v. *Florida,* 378 U.S. 153; *Anderson* v. *Martin,* 375 U.S. 399; *Goss* v. *Board of Education,* 373 U.S. 683. See *United States* v. *Guest,* 383 U.S. 745, 756–757; *Bell* v. *Maryland,* 378 U.S. 226, 326, 333 (Black, J., dissenting). Thus, the *Anderson* case held that, although individual voters are constitutionally free to select their elective officers partly, or even solely, on the basis of race, the State may not designate the race of the candidates on the ballot. The reason is that, while such governmental action neither denies nor abridges the voter's freedom of choice, it does gratuitously prompt and facilitate his succumbing to racial prejudice.

In sum, while the State, if otherwise uninvolved, normally has no obligation to take steps to enjoin or punish the discriminatory conduct of individuals, it cannot weight the scales on the other side—however slightly.

Ideally, short of combating it, the State should maintain a discreet silence and avoid all action affecting private discrimination. The basic rule is that the Equal Protection Clause does not tolerate the erection of a "shield of State law or State authority" to protect private discriminatory acts. *Civil Rights Cases, supra,* 109 U.S. at 17. See *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson, supra.* To be sure, that principle must sometimes yield. Occasionally, legitimate governmental action may incidentally assist private discrimination without running afoul of the Fourteenth Amendment on that account. To cite an

extreme example, although the indication of religious affiliation on military "dog tags" may facilitate religious discrimination, surely no one would challenge that necessary practice because of the unavoidable risk involved. So, also, the State courts have generally proceeded on the premise that the State's interest in maintaining law and order is sufficient to justify lending its policemen and its courts to enforce the discriminatory decision of a property owner to exclude particular persons—even if the availability of these remedies makes discrimination easier. And, finally, assuming the State is free to decline relief to the victims of invidious housing practices, we may concede, for present purposes, that a repeal of pre-existing fair housing legislation is permissible. But, if we tolerate such governmental action in support of invidious discrimination, it is only because, in an orderly society, that seems the necessary corollary of the assumption that the Fourteenth Amendment does not require the States to regulate wholly private conduct. The principle remains that the State cannot promote discrimination based on race, religion or national origin.

That, we stress, is the vice of Proposition 14. By the enactment in suit, California has done more than repeal anti-discrimination legislation. Nor was its action necessary to avoid resort to self-help. The plain fact is that insofar as it does not stop at repealing pre-existing statutes, but solemnly sanctions an affirmative right to discriminate invidiously, Proposition 14 involves the State gratuitously—and meaningfully—on the side of private discrimination.

Casuists may debate whether there is an analytical

distinction between the State's failure to provide a remedy for discrimination—which, in legal effect, creates a privilege to discriminate—and the declaration of a right to discriminate. Yet, surely there are occasions when the manner in which a privilege is recognized is itself significant because it carries the ingredient of incitement.

To illustrate, we may suppose a solemn statutory declaration to the effect that "the policy of the State is to perpetuate residential segregation on the basis of race, and, to that end, no officer or agent of the State shall interfere, directly or indirectly, with the right of every person to refuse to sell or lease to any person on any ground whatsoever, including the race of the prospective buyer or tenant." One might argue that, in the eye of the law, this is comparable to a court's action in declining to order a landlord to execute a lease to a prospective tenant who was refused solely on racial grounds. The analysis would be that the mention of race in our hypothetical provision is mere surplusage; that the characterization of the privilege to refuse to deal as a "right" was no more than the obverse of the non-right of the would-be buyer or tenant; and that the statement of public policy was a legally ineffective declaration in the air. Yet, although it carries not the slightest legal compulsion and erects no obstacle to non-discriminatory conduct, we take it for granted that the Fourteenth Amendment forbids such an enactment—even where it tolerates judicial enforcement of the "common law right" to discriminate.

The reason of the distinction must be that our hypothetical provision unnecessarily oversteps the

boundary of neutrality by promoting invidious discriminations. The same principle applies here. Indeed, although Proposition 14 does not expressly declare the State's preference in favor of discrimination, nor mention race, the text is otherwise comparable to that of our example. And, as construed by the Supreme Court of California in its setting, the provision must be read as concerned only with discriminations based on race, religion or national origin.

As we understand it, this is the basis of the opinion of Mr. Justice Stewart in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726–727. He there wrote with respect to a less obviously offensive statute than Proposition 14:

> * * * In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which *permits* the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers * * *." There is no suggestion in the record that the appellant as an individual was such a person. *The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment.* [Emphasis added.]

While the dissenting Justices in *Burton* disagreed with Mr. Justice Stewart's reading of the Delaware Court's opinion, they agreed that, if the statute did authorize a discriminatory classification, it would be

invalid under the Fourteenth Amendment. After quoting the Delaware Court, Mr. Justice Harlan wrote (365 U.S. at 729):

> If, in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute "as authorizing discriminatory classification based exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment.

And Mr. Justice Frankfurter said (365 U.S. at 727):

> If my brother [Stewart] is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment. * * *

This approach is not novel. In 1914, a unanimous Court speaking through Mr. Justice Hughes in *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, expressed a similar view. The Court there invalidated an Oklahoma statute which permitted railroads to "provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes." 235 U.S. at 161. The ground of the ruling was that, although the statute did not compel the inequality, the carrier who elected to deny equal services to Negroes would be "acting in the matter under the authority of a state law" and therefore violating the Fourteenth Amendment (235 U.S. at 161–162). See,

also, *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, 968 (C.A. 4), certiorari denied, 376 U.S. 938; *Boman* v. *Birmingham Transit Co.,* 280 F. 2d 531 (C.A. 5); *Civil Rights Cases, supra,* 109 U.S. at 17.

The rationale of those opinions appears to be that private conduct is an act done "under color of law" when a State statute expressly authorizes it. That is consistent with the original understanding of the Fourteenth Amendment. Indeed, the draftsmen of the Reconstruction statutes which reach only acts done "under color of law"—then, as now, viewed as coextensive with the concept of "State action" (*United States* v. *Price,* 383 U.S. 787, 794, n. 7)—made clear that they were intended not only as shields against violations by State officers abusing their official powers,[7] but were directed also at "the meanest man in the streets [who] covers himself under the protection or color of a law or regulation, or constitution of a State," one of the objects being to "prevent any private person from shielding himself under a State

[7] To be sure, the principal thrust of the decisions construing civil rights legislation which uses that phrase is that acts done "under color of office" which violate State law are nevertheless committed "under color of law." See *United States* v. *Classic,* 313 U.S. 299, 325–329; *Screws* v. *United States,* 325 U.S. 91, 107–113; *Williams* v. *United States,* 341 U.S. 97, 99–100; *Monroe* v. *Pape,* 365 U.S. 167, 172–187. But it does not follow, because "under color of law" includes illegal acts of officials, that those words do not also encompass the conduct of private individuals invoking the authority of local law to violate federal rights. See *Civil Rights Cases,* 109 U.S. 3, 16; cf. *Terry* v. *Adams,* 345 U.S. 461; *Gayle* v. *Browder,* 352 U.S. 903; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Peterson* v. *Greenville,* 373 U.S. 244.

regulation." Cong. Globe, 41st Cong., 2d Sess., p. 3663.[8]

But, at all events, there are other practical differences between an enactment like Proposition 14 and mere legislative inaction with respect to housing discrimination. First, the impact on State officials is quite different. Certainly, the equitable discretion of a judge to decline to enforce the discriminatory decision of a landowner, (cf. Mr. Justice Frankfurter, concurring, in *Hurd* v. *Hodge, supra,* 334 U.S. at 36), is diminished when the positive command of a legislative text instructs his action. So, also, the substitution of an express injunction against interference severely limits the latitude of all executive officials to encourage non-discrimination in a variety of ways. Even benevolent efforts at education and mediation may be halted, or at least embarrassed, if, as here, the text of the provision expressly restrains all State agencies from "denying or abridging," even "indirectly," the newly declared right to discriminate. Indeed, as we later demonstrate (*infra,* pp. 32–41), an overboard injunction like Proposition 14 may inhibit State officials from discharging their federal consti-

[8] This statement by Senator Sherman was made with reference to the bill that became the Enforcement Act of May 31, 1870 (16 Stat. 140), which, in § 18, re-enacted and extended Section 1 of the Civil Rights Act of 1866 (14 Stat. 27), the progenitor of 42 U.S.C. 1982. He reiterated the thought that "persons" as well as "officers" could discriminate "under color of existing State laws, under color of existing State constitutions" in the same colloquy. Cong. Globe, 41st Cong., 2d Sess., p. 3663. See, also, Senator Trumbull's statement with respect to the meaning of "color of law" in the 1866 Act. Cong. Globe, 39th Cong., 1st Sess., p. 1758.

tutional obligation to assure non-discrimination in transactions in which the State is involved.

The prejudicial effect of an official declaration of the right to discriminate is by no means confined to the State officers who are, in terms, addressed by the provision. Just as the amendments to the federal Constitution which speak directly to government also communicate their message to the citizenry, so does the present enactment. The beneficiaries of the provision are encouraged and emboldened by the express sanction of the practices involved. Conversely, the victims are deterred from seeking to enter segregated neighborhoods and segregated apartment buildings. And these effects are plainly aggravated when the rule is announced in a positive text of State-wide application.

To the layman at least, specific recognition of a "right"—so labelled—in a published text of positive law constitutes a special and persuasive encouragement. As witness to this, one need only cite the notice to quit, wholly for racial reasons, served on the tenant in *Hill* v. *Miller,* 50 Cal. Rptr. 908, 909, 413 P. 2d 852, 853, a companion case not brought here:

> The sole reason for this notice is that I have elected to exercise the right conferred upon me by Article I Section 26, California Constitution, to rent said premises to members of the Caucasian race.[9]

The ongoing force of explicit declarations of right and their tendency to acquire an influence beyond the

[9] We note that the property-owner in *Hill*, ultimately prevailed below, notwithstanding the unconstitutionality of Proposition 14, because his single-family dwelling was not regulated by California's fair housing laws. See 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P. 2d 33.

words themselves are exaggerated when they enjoy constitutional solemnity. An express "constitutional right" is, in common acceptance, an almost sacred thing, strong and inviolable. What is true of the federal Bill of Rights is presumably applicable also to the comparable provisions of a State constitution: the texts generally are not read grudgingly, but rather, are viewed as stating the official philosophy of the jurisdiction (*e.g., De Jonge* v. *Oregon,* 299 U.S. 353, 365) and as controlling not only the immediate subject but reaching to its "penumbra" (*Griswold* v. *Connecticut,* 381 U.S. 479). Proposition 14 invites such an expansive reading by tracking the absolute prohibition of the First and Fifteenth Amendments against "denial or abridgement" of the right declared and by adding the unequivocal injunction that no such interference shall be condoned whether accomplished "directly" or "indirectly."

In short, the provision in suit has an undeniable impact in practice—on the officers of the State who are directly addressed and on the beneficiaries (and the victims) of the provision—which could be achieved in no other way. Indeed, that is doubtless why Proposition 14 took the form it did. If the only purpose had been to disengage the State from the troublesome task of controlling private discriminations with respect to housing, a simple repeal of existing laws would have sufficed.[10] Yet no other objective

[10] We note that such a repeal could have been effected by the initiative process, which operates both for ordinary legislation and amending the State constitution. Indeed, a proposal for *legislative* action may be initiated by the electorate upon the filing of a petition signed by only 5 percent of the number who voted in the previous gubernatorial election—as contrasted to 8

was arguably legitimate. The gratuitous assurance that there was an affirmative right to discriminate invidiously could only encourage such offensive practices, without the slightest pretext to serving a proper State concern. In going beyond "the least possible power adequate to the end proposed" (*Anderson* v. *Dunn,* 6 Wheat. 204, 230–231, quoted in *Toth* v. *Quarles,* 350 U.S. 11, 23), California, we submit, has overstepped the constitutional line.

II. PROPOSITION 14 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SPECIALLY INSULATES THE RIGHT TO ENGAGE IN INVIDIOUS DISCRIMINATIONS FROM THE NORMAL POLITICAL PROCESSES OF CHANGE AND THEREBY PREJUDICES THE AFFECTED MINORITIES

We have already noticed some of the effects of California's decision to enshrine the "right" to discriminate in its constitution. It is a circumstance of aggravation, magnifying both the affirmative impact of the provision in the direction of discrimination and the inhibition of efforts towards residential desegregation. But the status of Proposition 14 as a constitutional text has another related, but distinct, consequence as well. It is this: that, by sheltering the right to discriminate in its constitution, the State has accorded it a unique insulation from the normal political processes, both locally and at the State level. In our view, even if it were permissible to solemnly codify the "common law right" to discriminate invidiously in real estate transactions, the attempt to freeze it into the law, beyond the effective challenge of the victims, violates the constitutional command of strict neutrality in this area.

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percent required for directly initiating legislation or a constitutional amendment. See Cal. Const., Art. 1, Sec. 4.

By virtue of its constitutional form and its all-inclusive injunction against both State and local governments, Proposition 14 lends both permanence and pervasiveness to the right declared. It is objectionable in both respects.

1. To specially shield discriminatory practices from the normal political processes of change is not consistent with the injunction of the Fourteenth Amendment that "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." In the circumstances, withdrawing the usual avenues of redress which the law provides in other cases works a serious inequality. Whatever might be said of a State constitutional provision that insulated economic regulations adversely affecting one group or another, we submit the State cannot so disadvantage the victims of invidious personal discrimination.

Of course, the example of traditional constitutional guarantees enshrined in a "Bill of Rights" does not bear on the propriety of California's action here. Because such a shelter can be afforded those rights which the federal Constitution requires the States to protect—like freedom of speech—does not mean that comparable insulation can be given to practices which are constitutionally tolerated only so long as the State avoids involvement. Thus, assuming provisions against amendment have binding force, it would seem clear that a perpetual bar to the repeal of the portion of the California Constitution that incorporates Proposition 14 would run afoul of the Fourteenth Amendment, whereas a similar stipulation with respect to the constitutional guarantee of freedom of religion would not. So, also, we suppose all would concede to be con-

stitutionally objectionable any provision that froze into the law the "right" announced by Proposition 14 for fifty years, or until five successive referenda had approved its repeal.

One ground of challenge to these hypotheticals might be interference with the present and personal right of the living to make their own political choices, free of shackles imposed by their ancestors, with respect to all matters in which the federal Constitution leaves them an option. But we believe the Equal Protection Clause also opposes these results because they prejudice the question in favor of discrimination, both by compelling long acquiescence in invidious practices, which tends to breed acceptance, and by unduly restricting the appeal of victimized minorities.

Albeit we deal with a "freeze" of the law in somewhat attenuated form, we believe the same principle governs. To be sure, Proposition 14 is theoretically subject to repeal at almost any time.[10a] But the process of amending the State constitution, in California as elsewhere, is very much more cumbersome than passing ordinary legislation. If sought by the legislature, the proposed amendment requires the concurrence of two-thirds of the members of each house before it can be submitted to the voters for ratification. Cal. Const., Art. 18, Sec. 1 (1966 Cum. Supp.),[11] while an amend-

[10a] Provided the requisite petition is filed at least 130 days theretofore, the initial proposal is submitted at the next "general election," or at an earlier special election, if the Governor so determines. Calif. Const., Art. 4, sec. 1. General elections are held every two years. See Calif. Elections Code, § 23.

[11] The same legislative vote is required whether the legislature wishes to draft its own proposal or suggest a constitutional convention. In the second case, the proposal to call a con-

ment proposal initiated by the people is submitted only if it obtains a number of signatures equal to 8 percent of the votes cast in the last gubernatorial election. Cal. Const., Art. 4, Sec. 1. Today, the initiative procedure would require a petition subscribed by almost half a million voters.[12] Thus, enshrining the right to discriminate in the constitution not only clothes it with the traditional immutability that inures to constitutional texts but places a very serious additional burden on even the most dedicated advocates of repeal.

The prejudice is particularly acute when the victims are relatively small minorities—the typical situation with respect to laws which authorize discrimination on account of race, religion or national origin. Unaided, they can never secure repeal of a hostile constitutional provision. Indeed, it is questionable whether those most likely to be subjected to housing discrimination could even provoke a vote on the question of repealing Proposition 14. It is hardly realistic to suppose they could persuade two-thirds of the legislators to repudiate the recorded preference of their constituents. And the initiative alternative is no more promising. None of the chief presumptive victims—Negroes, Orientals, Mexicans, nor Indians—if they must depend on the members of their own groups, have sufficient numerical strength to require submission of

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vention must be submitted to popular vote and the convention's draft must then be ratified by the people. Cal. Const., Art. 18, Sec. 2.

[12] 6,019,670 votes were cast for the gubernatorial candidates in the 1966 election. See New York Times, November 10, 1966, p. 34. Thus, an initiative petition proposing a constitutional amendment would require 481,574 signatures.

the issue to the voters.[13] Nor do all the racial minorities combined.[14] What is more, such minorities are usually economically less able than other groups to bear the cost of proceeding by the expensive route of initiative. Cf. *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663. But, at all events, even if they somehow succeeded in resubmitting the matter to the people, it would be with the handicap of being numerically overwhelmed.

In these circumstances, to deny the known victims of a law licensing discrimination the usual alternatives of the political process to seek a remedy, including recourse to an ordinary majority of the State legislature—often a more receptive audience[15]—is, we submit, less than even-handed dealing. It is irony amounting to injustice to relegate persecuted minorities to an appeal to unabated majority rule by insulating invidious practices in a "Declaration of Rights,"[16] whose traditional function is to protect the outnumbered against oppressive majorities.

2. Equally objectionable is the effect of Proposition 14 in forbidding local legislative bodies to act on the subject, thereby wholly withdrawing from the affected minorities, at that level also, the right to resort to the ordinary political processes to achieve equality. To be

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[13] Negroes comprise 5.6% of the total population of the State; all Orientals, 2.2%; Mexicans, 4.4%; Indians, 0.3%. See U.S. Census Bureau, *1960 Census of Population*, Vol. 1, Part 6, Tables 15, 40, 99, pp. 58, 232, 484.

[14] All non-white residents of voting age comprise only 7.5% of the total adult population. *Id.*, Table 16, pp. 56, 62.

[15] In the case of California, it was, of course, the legislature which enacted the Hawkins, Unruh and Rumfords Acts, and it declined to repeal them itself.

[16] Proposition 14 has been incorporated in the "Declaration of Rights" of the California Constitution as Article 1, Section 26.

sure, a State may normally distribute its legislative power as it sees fit—to the people, to the central legislature or to local entities. Cf. *Pacific Telephone Co.* v. *Oregon,* 223 U.S. 118; *Fortson* v. *Morris,* 385 U.S. 231; see, also, *Baker* v. *Carr,* 369 U.S. 186, 223–224. Yet there is no such absolute prerogative. As this Court said in *Gomillion* v. *Lightfoot,* 364 U.S. 339, 344–345, about the comparable power to alter or destroy political subdivisions, "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." Cf. *Graham* v. *Folsom,* 200 U.S. 248, 253–254; *Mobile* v. *Watson,* 116 U.S. 289, 305. Accordingly, it is proper to consider whether the State's action here violates the Fourteenth Amendment.

At least where gross injury results, the State, we submit, has the same burden of showing a rational basis for its action in withdrawing power from localities as it does when it grants them local option which produces substantial inequalities. See *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218. Cf. *Mobile* v. *Watson, supra.* Here, as in *Griffin,* the injury is clear and the justification wholly lacking. To deny the victims of housing discrimination any appeal for remedial legislation even at the local level—where they sometimes have substantial voting strength—is to shut off the political process arbitrarily. Indeed, the result is in some respects comparable to "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote," condemned in *Gomillion* v. *Lightfoot, supra,* 364 U.S. at 341. Here, too, the right withdrawn is a

meaningful one, as the number of local fair housing ordinances enacted before State-wide legislation attests.[17] Yet, no more than in *Gomillion* or *Griffin*, can the State justify its present action on permissible grounds. The Fourteenth Amendment forbids it from taking the view that a local ordinance eliminating invidious discriminations is an evil. We submit the State may not, for such a reason, withdraw local political power—especially when it has already largely closed the broader avenues of redress.

III. PROPOSITION 14 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT DISABLES STATE AGENCIES FROM FULFILLING THEIR CONSTITUTIONAL OBLIGATIONS

In our view, Proposition 14 offends the Fourteenth Amendment for the additional reason that, by its plain terms, it prohibits State agencies from acting in situations in which the Equal Protection Clause imposes a constitutional duty to act. Our premises are these: (1) that the Equal Protection Clause, by its own force, requires the State to take affirmative action to prevent invidious discrimination whenever nominally "private" conduct is "intertwined" with governmental action; (2) that Proposition 14 disables State agencies from taking constitutionally required affirmative action in many of these situations; (3) that Proposition 14, as construed by the California

[17] See, *e.g.*, U.S. Commission on Civil Rights, *1959 Report*, pp. 410–415; *id.*, *1961 Report: Housing* (*Book 4*), pp. 121–122, 200; Rhyne, *Civil Rights Ordinances* (1963), pp. 90–113; *Hearings before Senate Judiciary Subcommittee on Constitutional Rights on S. 3296*, 89th Cong., 2d Sess., Part I, p. 83; *Hearings before House Judiciary Subcommittee No. 5 on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 89th Cong., 2d Sess., p. 1068.

courts, must either stand or fall as a whole; and (4) that, because it is not severable, the plaintiffs in these cases have standing to challenge Proposition 14 on the ground here urged, even though its application to their particular factual circumstances would not be objectionable on that ground.

Before discussing each of the propositions in detail, we think it important to emphasize the limited reach of the argument we make here. For this purpose, we may assume that the Fourteenth Amendment permits a State to adopt a constitutional or statutory provision prohibiting its agencies and officers from taking any action to limit or restrain purely private acts of racial discrimination. To sustain our present argument, we need show only that California has not achieved that result by *this* provision of its constitution. The injunction of Proposition 14 sweeps too broadly because it not only restrains governmental interference with purely private acts of discrimination; it also inhibits State agencies from affirmatively carrying out the obligations imposed upon them by the Fourteenth Amendment with respect to property or transactions in which the State is significantly involved.

A. STATE AGENCIES HAVE A CONSTITUTIONAL DUTY TO TAKE AFFIRMATIVE STEPS TO PREVENT RACIAL DISCRIMINATION IN SITUATIONS WHERE PRIVATE CONDUCT IS INTERTWINED WITH GOVERNMENTAL ACTION

Repeated decisions of the Court have made it clear that, while the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (*Shelley* v. *Kraemer*, 334 U.S. 1, 13; see *Civil Rights Cases*, 109 U.S. 3; *United*

States v. *Harris*, 106 U.S. 629), its protection is not limited to acts of discrimination which are formally and officially those of the State itself. Conduct which appears on the surface to be private may nonetheless be subject to the restraints of the Fourteenth Amendment if "to some significant extent the State in any of its manifestations has been found to have become involved in it"—if the State "must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722, 725. The constitutional standard was summarized recently in *Evans* v. *Newton*, 382 U.S. 296, 299:

> Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. * * * [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

This Court and lower federal courts have applied this principle in a variety of factual circumstances. State involvement has been found in otherwise private decisions to segregate restaurant facilities and other places of public accommodation (see *Burton* v. *Wilmington Parking Authority, supra; Peterson* v. *Greenville*, 373 U.S. 244, 247–248; *Robinson* v. *Florida*, 378 U.S. 153, 156–157; cf. *Bell* v. *Maryland*, 378 U.S. 226, 326–327 (dissenting opinion)); schools (see

Pennsylvania v. *Board of Trusts,* 353 U.S. 230), and parks (see *Evans* v. *Newton,* 382 U.S. 296, 301–302). Substantial State or federal financial assistance to an otherwise private enterprise has been held sufficient to subject it to the strictures of the Fourteenth Amendment. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4), certiorari denied, 376 U.S. 938; *Eaton* v. *Grubbs,* 329 F. 2d 710 (C.A. 4). Prior governmental ownership or management of a facility transferred to private hands may have a continuing effect for purposes of the Fourteenth Amendment. *Evans* v. *Newton, supra,* 382 U.S. at 301; *Hampton* v. *City of Jacksonville,* 304 F. 2d 320 (C.A. 5); *Wimbish* v. *Pinellas County,* 342 F. 2d 804 (C.A. 5). And the interdependence of a private establishment and the publicly developed renewal area in which it is located has been held to require the private owner to meet the State's duty not to discriminate on account of race. *Smith* v. *Holiday Inns of America, Inc.,* 220 F. Supp. 1 (M.D. Tenn.), affirmed, 336 F. 2d 630 (C.A. 6).

If, as these cases demonstrate, the injunction of the Fourteenth Amendment that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws" applies whenever the State is significantly involved, even though the actual discriminatory choice is not made by a State agency, it necessarily follows that the State's duty in those circumstances is not merely to refrain from discriminating for impermissible reasons, but also to take affirmative action to insure that the private "joint

participant" does not engage in such discrimination. That principle was expressly recognized in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 724–725. The Court there observed that the State could not avoid its Fourteenth Amendment obligation to assure the non-discriminatory use of State property by leaving its lessor wholly free to admit or exclude customers on racial grounds, as he chose:

> As the chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of State participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. * * * By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. * * *

The Court concluded that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." 365 U.S. at 726. The holding is clear: in circumstances where State conduct is intertwined with private action, the Fourteenth Amendment imposes on the State an affirmative obligation to take steps aimed at

obtaining the private party's compliance with the constitutional duty not to discriminate.[18]

It follows that whenever the State is sufficiently involved in a seller's or lessor's affairs to make them "joint participants," it has an affirmative obligation to secure the private party's compliance with the constitutional standard.

B. PROPOSITION 14 DISABLES STATE AGENCIES FROM FULFILLING THEIR CONSTITUTIONAL OBLIGATION TO GUARD AGAINST DISCRIMINATION IN SITUATIONS WHERE THE STATE IS SIGNIFICANTLY INVOLVED

In unequivocal terms Proposition 14 prohibits State agencies from limiting in any manner the "right of any person" to discriminate on racial or other invidious grounds in the disposition of any interest in "his real property." It defines "person" as including every legal entity which could hold an interest in property, except only "the State or any subdivision thereof with respect to the sale, lease or rental of property *owned by it*" (p. 2, *supra*, emphasis added). It also defines "real property" as including "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed" (p. 2, *supra*). Thus, it seems plain, Proposition 14 restrains State agencies from taking any affirmative steps whatever to prevent arbitrary discrimination in

[18] Nor does that decision stand alone. The principle was implicit in *Griffin* v. *Illinois*, 351 U.S. 12, and in *Douglas* v. *California*, 372 U.S. 353, and was, in fact, adverted to in the dissenting opinions. 351 U.S. at 34; 372 U.S. at 362. So, also, it was one aspect of the ruling in *Terry* v. *Adams*, 345 U.S. 461. See, also, *Griffin* v. *County School Board*, 377 U.S. 218, 233.

all situations other than a disposition of government-owned property directly by the government itself. That is too narrow an exception to meet the demands of the Fourteenth Amendment.

At the outset, we notice two obvious respects in which the injunction of Proposition 14 is unjustifiably broad: it permits discrimination to be practiced by private persons even with respect to property owned by the State; and it permits even State agencies to discriminate with respect to property which is not *owned* by the State but merely leased to it or otherwise subject to its control. Proposition 14 nowhere recognizes that factors other than State ownership may amount to sufficient State involvement to call the Fourteenth Amendment into play. Indeed, by securing the right to discriminate "irrespective of how [the interest in real property is] obtained or financed", the provision wholly immunizes private residential discrimination even when practiced in a development financed entirely with State funds. In sum, it seems plain that Proposition 14 impermissibly licenses invidious practices in a great variety of transactions which the Fourteenth Amendment requires the State to purge of discrimination.

The clash between Proposition 14 and the demands of the Equal Protection Clause becomes apparent from an examination of a few hypothetical situations in which State agencies or their representatives would be confronted with conflicting obligations:

1. The State or its subdivision finances, at low interest rates, the construction of a large apartment

project. Should non-discrimination clauses be inserted in the loan agreements?

2. A municipality uses a large portion of its downtown area for an urban redevelopment project. It spends State and city funds to beautify the area and draws up plans for residential construction to be performed in that area on property owned by certain private real-estate firms which are specially licensed for this purpose. Should it impose non-discrimination obligations upon these firms?

3. A private corporation declares a municipality trustee of certain land and buildings which are to be rented as low-income housing to white residents. May the municipality admit Negroes to residence?

4. The State leases a portion of a State park to a private developer who builds cabins which are rented on a yearly basis. Should the State require him to make the cabins available to persons of all races?

5. The State has owned and operated a low-income project. It leases the project to a private corporation on the condition that it continue to be used for low-income housing. Should the State take steps to insure that a non-discriminatory policy is followed?

The above hypotheticals are, of course, only illustrative of the "multitude of relationships [which] might appear to some to fall within the Amendment's embrace." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726. The decisions we have already cited (pp. 34–35, *supra*) establish that in all these circumstances the Fourteenth Amendment applies to the

nominally private decision to discriminate, and that the State would have an affirmative duty to prevent such discrimination. But in each case Proposition 14 would forbid State agencies from taking any action. In the first and second hypotheticals, the non-discrimination clauses would plainly constitute abridgments of the private builders' "right"—protected by Proposition 14—to the free choice of tenants. In the third hypothetical, the municipal trustee would be abridging the legal owner's "right" not to rent to Negroes; the exemption would not apply because the property is not "owned" by the municipality. In the fourth and fifth hypotheticals—as is also true of the first and second—the "person" engaging in the discrimination is not the State but a private party. Although the State, when it is itself leasing its own land, may not discriminate on account of race, Proposition 14 gives the private lessee an inviolable right to do so. And nothing in Proposition 14 authorizes the State, when it leases its land, to demand a nondiscrimination clause as a condition of the lease. Indeed, that very conduct appears to violate the lessee's "right" as protected by Proposition 14.

To be sure, the Supreme Court of California in *Redevelopment Agency of Fresno* v. *Buckman,* 64 Cal. 2d 886, 50 Cal. Rptr. 912, 413, P. 2d 856, pretermitted the question whether Proposition 14 would be violated if the State Redevelopment Agency attempted to prevent racial discrimination on the part of real estate redevelopers who had been financed by State or federal funds. However, the California constitutional

provision appears clear on its face; in unequivocal terms, it proscribes any such steps. Moreover, in *Peyton* v. *Barrington Plaza Corp.*, 64 Cal. 2d 880, 50 Cal. Rptr. 905, 413 P. 2d 849, decided the same day, the court apparently held that Proposition 14 applied to a publicly assisted housing accommodation located in the midst of an urban renewal center.

C. RESPONDENTS MAY CHALLENGE THE CONSTITUTIONALITY OF PROPOSITION 14 ON THE GROUND SUGGESTED HERE EVEN THOUGH ITS APPLICATION TO THEIR CASES WOULD NOT BE OBJECTIONABLE ON THAT GROUND.

We have demonstrated that Proposition 14 collides, in a substantial variety of situations, with the commands of the Fourteenth Amendment. For the purpose of the present argument we do not, however, contend that the two cases presently before the Court involve the elements of State participation which, under the principles and decisions just discussed, give rise to an affirmative obligation on the part of the State to prevent private acts of racial discrimination. The question remaining, therefore, is whether the respondents in these cases may attack application of Proposition 14 to them on the ground that it would be unconstitutional as applied to other situations. We believe that under this Court's decisions that avenue is available to them, and that the plain unconstitutionality of Proposition 14 in many of its probable applications warrants striking down the provision in its entirety.

Preliminarily, we note that there can be no question as to respondents' "standing" to sue in the sense that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of * * * enforcement" of the challenged provision.

Massachusetts v. *Mellon,* 262 U.S. 447, 488. Respondents were accorded statutory rights under California Civil Code §§ 51, 52, and upon proving their allegations they would have been entitled to the relief requested in these cases if not for Proposition 14. The injury to them is, therefore, most direct in nature; the constitutional provision invalidates a State statute which has given them a legal right.

A more serious question is presented, however, by the principle—often repeated in this Court—that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines,* 362 U.S. 17, 21, and see authorities there cited. That principle—"that a litigant may only assert his own constitutional rights or immunities" (362 U.S. at 22)—is, as this Court noted in *Raines* (*id.* at 22–23), subject to a substantial number of exceptions. We believe that at least three reasons exist for not applying it to these cases.

First, this Court noted expressly in *Raines* that the general limitation discussed above is inapplicable "when a state statute comes conclusively pronounced by a state court as having an otherwise valid provision or application inextricably tied up with an invalid one * * *." 362 U.S. at 23. That, we believe, is the situation here because the highest court of California has, consistently with its prior decisions, read Proposition 14 as being the kind of provision which must either stand or fall as a single unit. It has held,

in other words, that under California law the constitutional provision is indivisible and cannot be sustained in part if it is in part invalid.

Although the court below did not proceed on the theory which we are presently urging, it did hold that Proposition 14 was invalid under the Fourteenth Amendment insofar as it related to racial discrimination. It then went on to recognize that there were other bases for choice than racial ones which might be exercised by persons subject to the provision, and that "in many applications [of Proposition 14] no unconstitutional discrimination will result" (R. 29). Notwithstanding this observation and the added circumstance that Proposition 14 itself contains an explicit severability clause, the Supreme Court of California held that the constitutional provision was not severable and that the clause saving it whenever it might constitutionally be applied "is ineffective" (R. 31).

That conclusion followed from the earlier decisions of California's highest court in *Franklin Life Ins. Co.* v. *California,* 63 Cal. 2d 222, 404 P. 2d 477, and *In re Blaney,* 30 Cal. 2d 643, 184 P. 2d 892, on which the court relied in the present case. Those decisions had established two State tests of severability: (1) whether "the language of the statute is mechanically severable, that is, [whether] the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words" (30 Cal. 2d at 655, 184 P. 2d at 900), and (2) whether "enforcement [of the constitutional part] entails the danger of an uncertain or vague future application of the statute" (63

Cal. 2d at 227, 404 P. 2d at 482). The severability of Proposition 14 under the theory of unconstitutionality which we urge apparently fails both California standards. There is no way of "mechanically" separating out, under the present text of Proposition 14, the situations in which the State is sufficiently involved to subject the private "joint participant" to the obligations of the Fourteenth Amendment from those cases where the discrimination is entirely private. And there could be no clearer instance of "uncertain or vague future application" than would follow a decision sustaining Propostion 14 in part. This Court noted in *Burton* that decision in this area turns entirely on "the framework of the peculiar facts or circumstances present." 365 U.S. at 726. There is no way of delimiting in advance, with adequate certainty, the constitutional applications of Proposition 14.

In sum, the State court's holding, binding on this Court, is that all situations covered by Proposition 14 are "inextricably tied up" (362 U.S. at 23) with one another, and that one application cannot be sustained while the other falls. In this posture of the case, the outcome here is controlled by the rule announced in *Dorchy* v. *Kansas,* 264 U.S. 286—that, although a State statute containing an unconstitutional provision might be saved in part, this Court would be bound by the determination of the State's highest court on the question whether the provision was severable. Because the State courts had not spoken to the question of severability and the challenged statute contained an explicit severability clause (264 U.S. at 290, n. 2),

this Court remanded the *Dorchy* case to the Supreme Court of Kansas for it to determine the issue. In the present case, however, the California court has already held that Proposition 14 is not severable insofar as it might be thought necessary to save it with respect to non-racial discrimination. While that is not the precise context of our present concern, the court's reasoning applies fully—and, indeed, more persuasively—to the issue of severability we have discussed. We therefore submit that, unlike *Dorchy,* remand is not required here; the judgments may be affirmed directly.

A *second* reason for viewing this case as outside the rule "that a litigant may only assert his own constitutional rights or immunities" (362 U.S. at 22) is that, like *Barrows* v. *Jackson,* 346 U.S. 249, 257, the present controversy concerns rights which cannot be readily asserted by those whom the impermissible conduct affects directly. We have shown that Proposition 14 has the effect of restraining State agencies from taking the affirmative steps required by the Fourteenth Amendment whenever State and private action are "intertwined." We know of no case, however where suit has been successfully maintained against the State or its agencies to compel it to perform these obligations. Yet the real vice of Proposition 14, according to our present submission, is precisely that State agencies will sit idly by even where the Fourteenth Amendment commands them to

act and will take no hand in insuring that racial discrimination is not practiced.[19]

Finally, a *third* ground for holding the "rule of practice" discussed in *Raines* (362 U.S. at 22) inapplicable here, is that the consequences of Proposition 14 are, in significant respects, like those of an overbroad restriction on speech—as to which there is a well settled exception to strict rules of standing. *NAACP* v. *Button,* 371 U.S. 415, 432–433; *Smith* v. *California,* 361 U.S. 147, 151; *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98; see *United States* v. *Raines,* 362 U.S. 17, 22. Statutes affecting First Amendment freedoms and other personal liberties protected by the Bill of Rights are tested on their face and not by their application to the particular cases brought by the parties challenging them because "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button,* 371 U.S. 415, 433. This Court recently invoked this principle in favor of the freedom to travel secured by the Fifth Amendment, *Aptheker* v. *Secretary of State,* 378 U.S. 500, 515–517, and it applies here as well.

The protected right of Negro citizens not to be denied equal protection by the State or by private persons acting jointly with the State is no less "delicate

[19] The successful suit of a rejected Negro applicant for a residence in publicly assisted housing will not likely cure that central defect, for the court's order in such a case ordinarily does no more than direct the private proprietor to cease his discriminatory conduct.

and vulnerable," we submit, than the freedom to travel. Proposition 14, in its overbreadth, prevents the full realization of those rights in California. For, just as an overbroad restriction in the area of speech has a "chilling effect" on expression which is constitutionally protected (*Dombrowski* v. *Pfister*, 380 U.S. 479, 487), so does the existence of an overbroad prohibition in this area inhibit State agencies and public officials from taking the action required of them by the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted.

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vs.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, *AMICUS CURIAE*

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IN THE

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vs.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, *AMICUS CURIAE*

The two proceedings before this Court on writ of certiorari to the California Supreme Court present the single question whether a provision recently added to the California Constitution violates the Constitution and laws of the United States. In each case, it was asserted that the owner of housing accommodations had violated a California statute prohibiting discrimination in the sale or

rental of housing on the basis of race, religion or national origin. In each case, the owner asserted that the statute had been invalidated by a clause added to the California Constitution by action of the voters on Election Day in 1964, on what was popularly known as "Proposition 14." The operative part of the clause, which is now Article I, Section 26 of the California Constitution, reads as follows:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The Supreme Court of California, on May 10, 1966, issued its decisions[1] in these cases holding that Article I, Section 26, violated the Equal Protection Clause of the Fourteenth Amendment.

Interest of the *Amicus*

This brief is filed, with the consent of the parties, on behalf of the National Committee Against Discrimination in Housing. The National Committee was founded in 1950. Its constitution specifies the following purpose:

> "To eliminate prejudice and discrimination, to lessen neighborhood tensions, to defend human and civil rights secured by law, * * *

---

1. *Mulkey* v. *Reitman*, 64 Cal. 2d 529, 413 P. 2d 825; *Prendergast* v. *Snyder*, 64 Cal. 2d 877, 413 P. 2d 847.

Its member organizations are as follows:

AFL-CIO
Amalgamated Clothing Workers of America, AFL-CIO
American Baptist Convention
American Civil Liberties Union
American Council on Human Rights
American Ethical Union
American Friends Service Committee
American Jewish Committee
American Jewish Congress
American Newspaper Guild, AFL-CIO
American Veterans Committee
Americans for Democratic Action
Anti-Defamation League of B'nai B'rith
Brotherhood of Sleeping Car Porters, AFL-CIO/CLC
Commonwealth of Puerto Rico, Department of Labor, Migration Division
Congress of Racial Equality—CORE
Cooperative League of the USA
Friendship House
Industrial Union Department, AFL-CIO
International Ladies' Garment Workers' Union, AFL-CIO
International Union of Electrical, Radio and Machine Workers, AFL-CIO
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
Jewish Labor Committee
League for Industrial Democracy
The Methodist Church
NAACP Legal Defense and Educational Fund, Inc.
National Association for the Advancement of Colored People—NAACP
National Association of Housing Cooperatives
National Association of Negro Business and Professional Women's Clubs
National Catholic Conference for Interracial Justice
National Committee on Tithing in Investment
National Community Relations Adivsory Council
National Council of Churches of Christ
National Council of Jewish Women
National Council of Negro Women
National Urban League
Protestant Episcopal Church
Scholarship, Education and Defense Fund for Racial Equality
Southern Regional Council
Synagogue Council of America
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church of Christ
United Presbyterian Church
United Steelworkers of America, AFL-CIO
Young Women's Christian Association

The National Committee submits this brief because Article I, Section 26 represents, in California and in all other states, a most potent device for indurating racial segregation in housing. The language of Article I, Section 26 is general and unqualified. No effort is made to catalogue the considerations which the amendment would immunize against state regulation or prohibition in a landowner's determination to withhold property from particular individ-

uals. Rather, by vesting "absolute discretion" in the property owner with respect to the disposition of his property, the amendment attempts to extend state constitutional protection to both reasonable and unreasonable motivations, ethical and unethical considerations, reasons that undermine the general welfare as well as those that do not, for selecting and rejecting willing buyers and renters.

The major impact of the amendment falls upon members of minority groups. A constitutional amendment was not needed to permit property owners to withhold a leasehold from lessees with pets, to withhold property in a senior citizens community from purchasers who do not meet an age requirement, or to withhold property for any number of considerations under commonly accepted tenets of desirable social and economic behavior. However, in recent years, the withholding of real property on purely racial or religious grounds and the resultant creation of segregated housing which denies equal opportunity for one of the essentials of living has been made the occasion for legal redress in California. Article I, Section 26 was proposed and passed for the precise objective of reversing that trend by granting and guaranteeing the right to discriminate on racial and religious grounds in the selling and leasing of real property.

The language of the amendment achieves that purpose. Under the phraseology used—"absolute discretion" and "decline to sell"—all Mexicans seeking homes in Los Angeles may be turned away because of their national origin by owners whose houses are on the market; all Japanese farmers may be denied farmland in the San Joaquin Valley

because they are not Caucasian; all Negroes in San Francisco may be told that they cannot rent apartments because of the color of their skin; all Jews may be excluded from a housing project because of the way they worship God. In those instances, at least, the amendment undeniably would sanction discrimination. It would even legalize total exclusion of specified groups from whole communities.

It is the position of Amicus that Article I, Section 26 of the California Constitution, by granting immunity from the sanctions of state law to those who discriminate against minority groups in selling or leasing homes, by withholding redress of state law from those who suffer such discrimination and by arbitrarily precluding the effective exercise of state power to deal with the evils and dangers to the state resulting from discrimination in the transfer of real property, is in conflict with the Constitution and laws of the United States.[2]

Questions to Which this Brief is Addressed

1. Whether, in view of the fact that discrimination against minority groups dominates the market for housing and deprives minority groups of equal opportunity to obtain housing, California, by adopting Article I, Section 26

2. We have been authorized by the following organizations to state that they support the arguments set forth in this brief and wish to be viewed as joining in its presentation: AFL-CIO; American Civil Liberties Union; American Jewish Committee; American Jewish Congress; Anti-Defamation League of B'nai B'rith; Industrial Union Department, AFL-CIO; International Ladies' Garment Workers' Union, AFL-CIO; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); NAACP Legal Defense and Educational Fund, Inc.; National Association for the Advancement of Colored People; and Scholarship, Education and Defense Fund for Racial Equality.

has violated its obligation to take appropriate action to prevent inequality in housing imposed upon it by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether Article I, Section 26 violates the guarantee in 42 U. S. C., Section 1982 of the right of all citizens to equal opportunity to purchase or lease property without discrimination based on race.

ARGUMENT

POINT ONE

The State of California has given legislative recognition to the existence and evil effects of discrimination in housing against minority groups.

A. Discrimination against minority groups dominates the housing market in California

The ghetto pattern that disfigures residential areas throughout the United States, including California, has been revealed in every study made of the subject, whether by public agencies or by private institutions. It means, in practice, that almost every housing unit placed on the market, for sale or rental, for slum dwellers or for millionaires, bears an invisible label marking it as available for whites only or for Negroes only. As a result, large numbers of Negroes and members of other minority groups are denied the opportunity to purchase housing adequate for their needs which they could otherwise afford and are compelled to live in racially segregated areas of poorer quality and status.

In 1961, the U. S. Commission on Civil Rights observed:[3]

> In 1959 the Commission found that "housing * * * seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay." Today, 2 years later, the situation is not noticeably better.
>
> Throughout the country large groups of American citizens—mainly Negroes but other minorities too—are denied an equal opportunity to choose where they will live. Much of the housing market is closed to them for reasons unrelated to their personal worth or ability to pay. New housing, by and large, is available only to whites. And in the restricted market that is open to them, Negroes generally must pay more for equivalent housing than do the favored majority. "The dollar in a dark hand" does not "have the same purchasing power as a dollar in a white hand."

And the California Advisory Committee to the U. S. Commission on Civil Rights has reported:[4]

> The State of California has a large and increasing Negro population. These people live mainly in segregated patterns in the major urban centers of the State. In most cases, Negro housing areas are considerably less attractive than housing in other areas.

* * *

3. Report of the U. S. Commission on Civil Rights, Book 4, Housing, p. 1 (1961). See also, Report of the President's Committee on Civil Rights, *To Secure These Rights*, pp. 67-70 (1947); Myrdal, *An American Dilemma*, pp. 618-27 (1944); Weaver, *The Negro Ghetto* (1948); Abrams, *Forbidden Neighbors*, pp. 70-81, 137-49, 150-190, 227-243 (1955); Commission on Race and Housing, *Where Shall We Live?*, pp. 1-10 (1958); Report of the U. S. Commission on Civil Rights, pp. 336-374 (1959).

4. U. S. Commission on Civil Rights, "50 States Report", pp. 43-46 (1961).

> As California's Negro population increases, pressure builds up in the great urban ghettos, and slowly but perceptibly the segregated areas enlarge. The Committee found that, as a general rule, Negro families do not move individually throughout the community. They move as a group. This is true in most cases of the relatively high-wage Negro professional group. It is practically universally true of Negroes in the lower mass group.
>
> This Negro housing problem is widespread. Negroes encounter discrimination not only where houses in subdivisions and in white neighborhoods are concerned but also in regard to trailer parks and motels. Testimony received by the Committee indicated that the trailer-park situation is particularly acute and that, especially in the southern part of the State, few, if any, trailer parks will accept Negroes.[5]

Unquestionably there is an established pattern of segregation in housing, and in the sale and rental of real estate, in California.

B. Residential segregation in California has harmful effects.

Because of the pervasive nature of discrimination in housing, we have in effect two housing markets, one for whites and one for non-whites. The resulting oppressive effects on the direct victims of discrimination and on the interests of the state as a whole are readily demonstrated.

---

5. The existence of housing bias in California's two principal metropolitan areas is further documented in McEntire, *Residence and Race* (1960), in a chapter (pp. 32-67) studying residential patterns in 12 large cities representing the major regions of the country, including Los Angeles and San Francisco. See particularly the maps showing racial concentration in those two cities, pp. 61-66.

1. The most obvious price paid by those who are discriminated against is a loss of freedom. "The opportunity to compete for the housing of one's choice is crucial to both equality and freedom," declares the Commission on Race and Housing.[6]

Within their financial limits, majority groups in America are free to choose their homes on the basis of a number of factors germane to their pursuit of happiness: the size of house needed to accommodate the family; preferences for particular styles of housing or kinds of neighborhoods; the availability of community facilities such as churches, schools, playgrounds, clubs, shopping, and transportation.

This freedom of choice is denied members of minority groups. Granted the means a non-white person may buy any automobile, any furniture, any clothing, any food, any article of luxury offered for sale. But it is not possible for a non-white American to bargain freely, in an open, competitive market, for the home of his choice, regardless of his intellect, integrity or wealth.

The U. S. Commission on Civil Rights, referring to the "white noose around the city," has said:[7]

> There may be relatively few Negroes able to afford a home in the suburbs, and only some of these would want such homes, but the fact is that this alternative is generally closed to them. It is this shutting of the door of opportunity open to other Americans, this confinement behind invisible lines, that makes Negroes call their residential areas a ghetto.

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6. Report of Commission on Race and Housing, Where Shall We Live?, p. 3 (1958).

7. Commission on Civil Rights, 1959 Report, p. 378.

Housing discrimination also abridges the right of the majority group owner freely to sell or rent his property. The mechanics of the dual, segregated housing market restrict the market within which the white seller may find prospective purchasers. For practical purposes, he is compelled by the prevailing practices in the housing market to offer his house to whites only or to Negroes only.

2. Housing discrimination imposes a heavy economic penalty on the Negro. As the U. S. Commission on Civil Rights pointed out in the portion of its 1961 Report quoted above, "Negroes generally must pay more for equivalent housing than do the favored majority."[8] This is because the discriminatory practices that hold down the supply of housing available to Negroes inevitably raise the price or rent they must pay.

McEntire, after reviewing all past studies as well as those conducted for the Commission on Race and Housing, concluded:[9]

> Racial differences in the relation of housing equality and space to rent or value can be briefly summarized. As of 1950, nonwhite households, both renters and owners, obtained a poorer quality of housing than did whites at all levels of rent or value, in all regions of the country. Nonwhite homeowners had better quality dwellings than renters and approached more closely to the white standard, but a significant differen-

8. Similarly, the Commission on Race and Housing, in its Report, *Where Shall We Live?* (1958), p. 36, said: "* * * segregated groups receive less housing value for their dollars spent than do whites, by a wide margin."

9. *Op. cit. supra*, p. 155.

tial persisted, nevertheless, in most metropolitan areas and value classes. * * *

3. Other, less tangible, injuries are inflicted on the victims of discrimination in housing, with resultant evil effects on the state itself.[10] "All of our community institutions reflect the pattern of housing," the president of the Protestant Council of New York has stated. "It is indescribable, the amount of frustration and bitterness, sometimes carefully shielded, but the anger and resentment in these areas can scarcely be overestimated and can hardly be described; and this kind of bitterness is bound to seep, as it has already seeped, but increasingly, into our whole body politic." He said he could "think of nothing that is more dangerous to the nation's health, moral health as well as physical health, than the matter of these ghettos."[11]

Residential discrimination and segregation impede the social progress and job opportunities of minority groups, and deprive the whole community of the contributions these Americans might otherwise make. It is questionable whether we can fully comprehend the enormous harm to the individual and to the community in terms of waste of human and economic resources.

4. Perhaps the most notorious effect of the ghetto system is its creation of slums, with all their attendant evils —to the slum dweller and to the public weal. As we have seen, housing bias compels non-white groups to live in the

10. See, in particular, Clark, Prejudice and Your Child (1955), pp. 39-40.

11. U. S. Commission on Civil Rights, 1959 Report, p. 391.

restricted areas available to them. The California Supreme Court summarized the results as follows in *Burks* v. *Poppy Construction Co.*, 57 Cal. 2d 463, 471 (1962):

> Discrimination in housing leads to lack of adequate housing for minority groups [citations omitted], and inadequate housing conditions contribute to disease, and immorality.

In 1959, the U. S. Commission on Civil Rights described the effects of residential discrimination as follows: "The effect of slums, discrimination and inequalities is more slums, discrimination and inequalities. Prejudice feeds on the conditions caused by prejudice. Restricted slum living produces demoralized human beings—and their demoralization then becomes a reason for 'keeping them in their place' * * * Not only are children denied opportunities but the city and nation are deprived of their talents and productive power." The Commission reported that a former Secretary of Health, Education and Welfare estimated the national economic loss at 30 million dollars a year, representing the diminution in productive power of those who by virtue of the inferior status imposed upon them were unable to produce their full potential.[12]

Two years later, the Commission reiterated its conclusion and added: "These problems are not limited to any one region of the country. They are nationwide and their implications are manifold * * *"[13]

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12. U. S. Commission on Civil Rights, 1959 Report, p. 392; Commission on Race and Housing, *op. cit. supra*, pp. 5, 36-38; Groner & Helfeld, Race Discrimination in Housing, 57 Yale L. J. 426, 428-9 (1948).

13. U. S. Commission on Civil Rights, 1961 Report, Book 4, "Housing," p. 1. See also McEntire, *op. cit. supra*, pp. 93-94.

5. The racial patterns of the slums resulting from housing bias severely impede programs of slum clearance and urban renewal. The price paid for these civic improvements in terms of forced moves and disrupted lives, is often borne most heavily by the minority families that live in the cleared areas.

The problem has been fully described by the U. S. Commission on Civil Rights.[14] It points out that minorities are frequently the principal inhabitants of the areas selected for slum clearance or urban renewal.[15] But each of these programs depends for success on the ability to relocate some or all of the slum dwellers. Urban renewal obviously contemplates the destruction or renovation of obsolete slum buildings, the residents of which must of course move. If they are simply moved to another segregated area, adding to its population densities, a new slum is created. In those circumstances, the renewal program represents little in the way of net reduction of slums.

As Albert M. Cole, former Federal Housing and Home Finance Administrator, has said:[16]

14. U. S. Commission on Civil Rights, 1961 Report, Book 4, "Housing," c. 4: "Urban Renewal," especially pp. 82-83. See also Commission on Race and Housing, *op. cit. supra*, pp. 37-40.

15. From the beginning of the Federal urban renewal program in 1949 up to 1960, slum clearance and urban renewal projects had relocated 85,000 families. Of the 61,200 families whose color is known, 69% were non-white. Housing & Home Finance Agency, Relocation from Urban Renewal Project Areas through June 1960, p. 7 (1961).

16. "What is the Federal Government's Role in Housing?" Address to the Economic Club of Detroit, Feb. 8, 1954, quoted in Report of the Commission on Race and Housing, Where Shall We Live?, p. 40 (1958).

> Regardless of what measures are provided or developed to clear slums and meet low-income housing needs, the critical factor in the situation which must be met is the fact of racial exclusion from the greater and better part of our housing supply. * * * No program of housing or urban improvement, however well conceived, well financed, or comprehensive, can hope to make more than indifferent progress until we open up adequate opportunities to minority families for decent housing.

The California Advisory Committee to the U. S. Commission on Civil Rights discovered that these factors were in full operation in that State, with clearly visible harm to the Negro population. It reported:[17]

> The Committee found that concentration of Negro families into certain specified areas within California cities seems to be augmented, rather than alleviated, by urban renewal projects. It appears that Negroes displaced by such projects tend to find alternative housing in pre-existing Negro sections. There seems to be little effort to guide displaced families in their selection of homesites. The project moves forward and Negro families along with other groups, must quickly find new homes. More often than not these Negro families settle in adjacent ghettos already in existence.
>
> As the proportion of minority group members is extremely high in the so-called "blighted areas" of our State's larger cities, this is a major problem for those concerned with civil rights and minority housing.

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17. 50 States Report, *supra*, p. 45.

6. The harmful effects of residential segregation are not limited to housing. A conspicuous feature of the ghetto system is its tendency to produce segregation in education and all other aspects of our daily lives.[18] It is primarily responsible for the wide-spread *de facto* segregation that hampers Negroes and persons of Puerto Rican and Mexican origin in urban public schools.[19] It has even impaired the job opportunities opened up by fair employment laws.[20]

One of the most disturbing features of the physical pattern of segregation, whether in housing or otherwise, is that it builds the attitudes of racial prejudice which, in turn, strengthen the segregated conduct patterns. This was recognized two decades ago by a Presidential Committee:[21]

> For these experiences demonstrate that segregation is an obstacle to establishing harmonious relationships among groups. They prove that where the artificial barriers which divide people and groups from one another are broken, tension and conflict begin to be re-

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18. Myrdal, An American Dilemma, p. 618 (1944); Commission on Race and Housing, *op. cit. supra*, pp. 35-36.

19. Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353, 354-5 (1961). In its 1959 Report, the U. S. Commission on Civil Rights said (at p. 545): "The fundamental interrelationships among the subjects of voting, education, and housing make it impossible for the problem to be solved by the improvement of any one factor alone." See also pp. 389-90.

20. N. Y. State Commission Against Discrimination, In Search of Housing, A Study of Experiences of Negro Professional and Technical Personnel in New York State (1959).

21. Report of the President's Committee on Civil Rights, To Secure These Rights, pp. 82-7 (1947).

placed by cooperative effort and an environment in which civil rights can thrive.[22]

7. All the evils discussed above combine to create the gravest danger of all to the security of society—the ever present threat of violent race conflict. Virtually every instance of such violence in the last two decades—outside of the South—has reflected the ghetto system. It has arisen either out of efforts by Negro families to move into previously all white areas or out of the tensions that build up within the ghetto. It is enough to remind this Court of the riots of 1965 in the Watts and other Negro districts of Los Angeles that caused the loss of 34 lives and property damages estimated at $40,000,000.[23] California would not have had a Watts riot if it had not had a Watts in the first place.

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22. The impact of housing discrimination is not limited to citizens of our country. The California Advisory Committee to the U. S. Commission on Civil Rights confirms this (50 States Report, *supra*, p. 46):

> Discrimination in housing directed against Negroes has had an unfortunate impact on foreign students whose skin colors are dark. The Committee heard testimony from an Indian student at Sacramento State College who indicated that he had been refused accommodations in a number of instances because of his color. The testimony of student government leaders at the same school indicated that this foreign student problem is significant. Commendably, student groups at Sacramento State are trying to do something about this situation through investigation and conference.
>
> The Committee is very disturbed by the evident impact of discriminatory treatment on foreign students whose preconceptions about American democracy have been rudely upset. These students are potential leaders in their own countries and the image of America which they take back with them can be significantly tarnished by such experiences.

23. "Violence in the City—An End or a Beginning," Report by the Governor's Commission on the Los Angeles Riots (Dec., 1965), p. 1.

C. The State of California has recognized the existence and harmful effects of racial discrimination in housing by enacting legislation against such discrimination.

The State of California has given formal recognition to the existence and evil effects of discrimination based on race, religion or national origin by the enactment of anti-bias legislation. It is true that, as we note below, its policy has been far from consistent, particularly in housing. At times, in fact, its laws have affirmatively facilitated and even required discrimination. In recent years, however, until the approval of Article I, Section 26 by referendum, the California Legislature has recognized reality by moving progressively to curb the ghetto system.

In 1959, California enacted a measure known as the "Hawkins Act" which prohibited discrimination in "publicly assisted housing accommodations."[24] In the same year, it adopted the "Unruh Act" which revised its law dealing with places of public accommodation to make it applicable to "all business establishments of every kind whatsoever."[25] This law was subsequently held to apply to those in the business of selling or leasing residential housing.[26]

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24. Cal. Stats. 1959, c. 1681, pp. 4074-7, Health and Safety Code, sections 35700-35741.

25. Cal. Stats. 1959, c. 1866, p. 4424, Cal. Civil Code, Secs. 51-52 (1965).

26. *Lee* v. *O'Hara*, 57 Cal. 2d 476, 370 P. 2d 321 (1962) (real estate brokers); *Burks* v. *Poppy Construction Co.*, 57 Cal. 2d 463 (1962) (developer of a tract of single family homes).

In 1963, California enacted the measure popularly known as the "Rumford Act," which added sections 35700-35744 to the Health and Safety Code[27] and replaced the provisions of the "Hawkins Act." The Rumford Act was broader than the Hawkins Act in covering, *inter alia*, residential housing containing more than four units, even though not publicly assisted. In addition, the Legislature vested the exclusive authority to administer the Rumford Act in the Fair Employment Practice Commission. The legislative policy which the Rumford Act implemented is expressed as follows (Health and Safety Code, sec. 35700):

> The practice of discrimination because of race, color, religion, national origin, or ancestry in housing accommodations is declared to be against public policy.
>
> This part shall be deemed an exercise of the police power of the State for the protection of the welfare, health, and peace of the people of this State.

The existence and evil effects of discrimination in housing have been recognized not only by the legislative branch of the state government but also by its judicial branch. *Burks* v. *Poppy Construction Co., supra*, 57 Cal. 2d at 471; *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 881 (1963).

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27. Cal. Stats. 1963, c. 1853, Sec. 2, p. 3823.

POINT TWO

Article I, Section 26 violates the Equal Protection Clause of the Fourteenth Amendment by encouraging, empowering and facilitating discrimination in housing against minority groups.

A. The Fourteenth Amendment requires the states to take appropriate action to prevent inequality in housing.

Article I, Section 26, if valid, would disable the state and local legislative bodies of California from acting to prevent discrimination by the owners of housing in sales or rentals.[28] It would also preclude the state judiciary from developing and applying common law principles that limit such discrimination in any manner. At one stroke, it would greatly limit if not undo the effect of all existing state regulation in this field, prohibit future action at any level of state government and assure to private owners of realty freedom from any state restraint on creation of the discriminatory housing conditions that create many of California's serious social problems. We suggest that the strictures of the Fourteenth Amendment cannot be so easily avoided in matters of governmental responsibility.

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28. Article I, Section 26 applies only to sales and rentals by the property owner. Presumably, therefore, it leaves the existing state laws in effect insofar as they apply to discrimination initiated by real estate brokers and discrimination by banks and other institutions in the financing of housing. It also goes without saying that this provision, even if valid, does not suspend the limitations of the Thirteenth and Fourteenth Amendments insofar as they apply to housing benefitted by "state action." Neither does it affect the power of the Federal Government to deal with housing bias by legislation, such as 42 U. S. C. Sec. 1982 referred to below, or by executive action, such as the Executive Order issued by President Kennedy in 1962 barring discrimination in housing receiving certain forms of Federal assistance. Executive Order No. 11063, 27 Fed. Reg. 11527 (1962).

The purpose of the Fourteenth Amendment was to protect the rights of minority groups with respect to activities in which, under our political system, the state is expected to play a role. When this Court originally construed that Amendment as dealing only with "state action," it did so on the assumption that the states would act appropriately to prevent abuse of their legal systems so as to permit denials of equal opportunity. Thus, in the *Civil Rights Cases*, 109 U. S. 3 (1883), where it held that the Federal Government did not have power to prohibit discrimination by private parties in operating places of public accommodation, it proceeded on the assumption that individual rights "may presumably be vindicated by resort to the laws of the State for redress" (109 U. S. at 17). It said (at 19):

> We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

It also said (at 25):

> Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.

This Court thus made it plain that our federal system of government posits a responsibility on the part of the states to prevent inequality through protection of individual

rights. That responsibility, like "state action," is an expanding concept. Governmental responsibility generally has necessarily grown with the proliferation of complex problems in contemporary life. State and individual have more points of contact today than in years gone by. In the same way, the need for state action to insure equality in basic rights has grown.

As we have shown in Point One, California is scarred by minority group ghettoes that cause severely harmful effects both for the minority groups directly affected and for the public at large. Those evil effects have been highlighted by the tragic events of the Watts riots of 1965 and the official report on its causes and consequences.

California, like 16 other states,[29] has recognized the obligation that these facts impose upon it by enacting appropriate legislation to curb housing bias. By now adopting Article I, Section 26, which in effect repudiates that obligation, California has violated the mandate of the Fourteenth Amendment.

B. The momentum of California's involvement in regulation of discrimination in housing makes its facilitation of discrimination state action within the reach of the Fourteenth Amendment.

What is at stake here is the shaping of residential areas. To a large extent, in our present complex society, that is already done or controlled by state action—in the form of zoning regulations, building restrictions, control over con-

29. The statutes are listed and summarized in "The Fair Housing Statutes and Ordinances," Report of the National Committee Against Discrimination in Housing (June, 1966).

struction of roads and other forms of transportation as well as the supply of public utilities and many other factors that determine the nature of a community. Where there is no regulation by the state of sales and rental policies, those who own and control housing have the power to create a pattern of segregation and impose it on a state's entire complex of residential areas. Experience shows that they do just that and that the result is that large segments of the population are denied equal opportunities because of their race, religion or national origin and are consequently compelled to live in squalid, disease-breeding ghettoes which create festering dangers to society.

On the basis of that experience, California recast its laws so as to break the pattern of segregated housing. We submit that this was, in effect, a fulfillment of its obligation, discussed in the preceding section, to use its legislative powers to create and enforce individual rights so as to prevent inequality. But whether or not we are right in this, it is plain that regulation of the racial character of neighborhoods so as to prevent denial of equality has become an accepted aspect of government in California. Whether or not California has an obligation to undertake such regulation, it has done so. We submit that this Court's decision in *Evans* v. *Newton,* 382 U. S. 296 (1966) establishes that any further action by the state in this area must be judged on the basis of whether or not it facilitates discrimination, even by private parties.

In the *Evans* case, the city of Macon, Georgia, had became involved in the administration of a public park under a private will which limited use of the park to white

persons. The city had recognized in recent years that, under the Fourteenth Amendment, it could not exclude Negroes from the park. See *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230 (1957). A suit was brought in the Georgia courts by the Board of Managers of the park against the city to compel it to resign as trustee so that the provision of the will requiring exclusion of Negroes could be observed. The city thereupon tendered its resignation which was accepted and private trustees were appointed by the state court. The only reason for the appointment of the private trustees was to enable Negroes to be excluded from the park.

This Court reversed the action of the state court on grounds which are pertinent to the present case. It pointed out that, "The action of a city in serving as trustee of property under a private will serving the segregated cause is an obvious example" of "[C]onduct that is formally 'private' " but which has "become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U. S. at 299. The essence of the opinion was that the state-private involvement which brought about Fourteenth Amendment control had not become "disentangled" (*id.* at 302).

The same week that this Court decided *Evans* v. *Newton*, the United States Court of Appeals for the Fourth Circuit decided *Hawkins* v. *North Carolina Dental Society*, 355 F. 2d 718 (C. A. 4, 1966). The plaintiff in that case, a Negro, sued for admission as a member of the North Carolina

Dental Society, basing his claim primarily upon the fact that members of the society, by statute, elected the State Board of Dental Examiners, a governmental body. Following the filing of the case, the state repealed the statute. The court nevertheless took note of the fact that, in actual practice, the Dental Society still exercised the powers it had had under the statute. Accordingly, the court held that the limitations of the Fourteenth Amendment still applied and that the plaintiff was entitled to admission to this state agency.

These cases, *Evans* and *Hawkins*, have the common characteristic that, once state control attaches, bringing in Fourteenth Amendment limitations, repeal of the legislation or other termination of the state control does not automatically remove the impact of those limitations. At the very minimum, the burden is upon those formerly subject to the limitations to show that there has been complete "disentanglement."

In this case, the State of California had enacted fair housing legislation. This legislation was not a mere fortuitous sally into the area of housing regulation. It was a recognition by the State that it had a duty under its police power to take action against housing discrimination in order to prevent and eliminate inequality and other serious social evils. Having recognized its obligation and having provided a remedy to enforce the right to that protection, the state cannot now divest that right. Indeed, *Evans* and *Hawkins* are but particular examples in a racial context of the constitutional rule established by this Court in *Truax* v. *Corrigan*, 257 U. S. 312, 329 (1921).

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that

> the legislative power of a State can only be exercised in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.

Implicit in the *Evans* and *Hawkins* rulings is the concept that it is the fact rather than the legal structure of unequal protection that determines application of the Fourteenth Amendment. The State will not be allowed to avoid its constitutional obligation by attaching or removing labels or by fraudulently seeming to wash its hands of a responsibility which it cannot in truth avoid.

Over a period of years, the State of California enacted a series of laws which recognized that its pre-existing legal system resulted in unequal opportunity, because of race, to obtain a "necessary of life." *Block* v. *Hirsh*, 256 U. S. 135, 156 (1921). In *Evans*, this Court said, "* * * when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations" (382 U. S. at 299). It also quoted its earlier holding in *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946), that a State may not permit private enterprises "to govern a community of citizens so as to restrict their fundamental liberties * * *."

By repudiating the responsibility it acknowledged when it adopted its laws against discrimination in housing, to deal

with the evil of housing bias, California has done what these cases say it may not do. It has restored the system under which every housing unit placed on the market by private enterprise carries a label marking it as available only to members of one race. It has given private builders and other owners of real property the power not merely to "govern" communities but to create them in a manner that restricts "fundamental liberties."

It is also important that this Court, in *Evans,* recognized that discrimination in the park in question might not have been unconstitutional if the City had never been involved but that the involvement of the City created a "momentum" that could not simply be turned off by City withdrawal (382 U. S. at 301). So here, the state, recognizing the fundamental inequality in housing opportunity created under its laws, undertook to exercise its police power to bring about equality. Its present reversal of that decision constituted affirmative action in support of inequality that violated "the mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon,* 286 U. S. 73, 88 (1932).

C. Article I, Section 26 places the support of the legal system of California behind racial discrimination in housing.

The decisions of this Court establish that racial discrimination by private individuals is not wholly beyond the reach of the Fourteenth Amendment. While it has held that there must be a nexus between individual action and the state in order to bring the Federal Constitution into play, state involvement need not rise to the level of direct

or affirmative action to trigger application of the Amendment.

A state law requiring individual discriminatory acts[30] is perhaps the most obvious form of state action through individual conduct but the application of the Fourteenth Amendment has not been limited to such flagrant situations. A state cannot exculpate itself merely by showing that a private person made the effective determination to engage in invidious discrimination or some other invasion of fundamental rights.[31] Implication of the state through official authorization or encouragement of unequal treatment of the races,[32] through the availability of its sanctions in support of such inequality,[33] or through failure to act in an area of state responsibility involving discriminatory conduct,[34] all have provided the occasion for invocation of the Fourteenth Amendment.

The new amendment to the California Constitution places the state's legal system squarely behind private acts of housing discrimination. The landlord who would deny Negroes the opportunity to rent or purchase is given the signal to proceed. But discrimination authorized or encouraged by the state has consistently been condemned under the Fourteenth Amendment, even though the decision to discriminate is left to private choice. See, *e.g.*, *Shelley*

30. *Buchanan* v. *Warley*, 245 U. S. 60 (1917).

31. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

32. *Anderson* v. *Martin*, 375 U. S. 399 (1964).

33. *Shelley* v. *Kraemer*, *supra*.

34. *Smith* v. *Allright*, 321 U. S. 649 (1944); *Terry* v. *Adams*, 345 U. S. 461 (1953); *Evans* v. *Newton*, 382 U. S. 296 (1966).

v. *Kraemer,* 334 U. S. 1 (1948); *Barrows* v. *Jackson,* 346 U. S. 249 (1953); *Anderson* v. *Martin,* 375 U. S. 399 (1964); *McCabe* v. *Atchison T. & S. F. Ry.,* 235 U. S. 151 (1914); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Boman* v. *Birmingham Transit Company,* 280 F.2d 531 (C. A. 5, 1960).

The new amendment implicates state agencies in discriminatory practices in a manner no different in principle than was the case in *Shelley* v. *Kraemer, supra.* There the enforcement of private discriminatory practices by state courts was determined to be state action within the Fourteenth Amendment. Under the new amendment, the state judiciary is brought into play on the side of discriminatory practices in an equally meaningful way, i.e., through protecting the act of discrimination against legal interference. The point is illustrated by *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242 (1962), where the court concluded that a Negro might defend an action of unlawful detainer by showing that his rental property was being taken from him solely on account of his color. Article I, Section 26, however, would deprive the Negro defendant of his defense on the ground that the landlord may decline to rent on any ground he chooses. Thus, the California courts would be required to strike the defense in a repetition of the *Abstract Investment* case. Plainly, if the Federal Constitution bars the state courts from enforcing eviction on racial grounds, as held in *Abstract Investment,* and the new amendment to the State Constitution prohibits the judiciary from preventing such an eviction, the Federal Constitution and Article I, Section 26 are at war.

It is simply not true that the new amendment merely places the state in a neutral position—neither encourag-

ing nor discouraging racial discrimination. The enactment of an affirmative state policy banning state interference with landowners who discriminate against racial minorities cannot be equated with the absence of statutory law relating to discrimination.

Unlike the situation that would exist if present fair housing legislation were merely repealed, the new amendment (1) prevents the development of common law judicial remedies against private acts of racial discrimination, (2) precludes future State and local legislative action against private acts of racial discrimination, no matter how moderate the action or how pressing its need, and (3) enshrines in the California Constitution the grant of an "absolute" right in owners of real property to discriminate on racial and religious grounds. This we submit is not "neutrality." It constitutes action of the State directly sanctioning, encouraging and empowering private acts of racial discrimination. There is, in fact, a difference in kind between state failure to prohibit private acts of racial discrimination (no fair housing legislation) and amendment of a state constitution making private acts of racial discrimination a protected "right." In the former instance, private acts of racial discrimination are, to be sure, not prevented by legislation, but in the latter instance, they are actually encouraged and empowered by the State.

The new amendment on its face tends to encourage racial discrimination in housing on the part of those who desire to engage in it. As observed in *Barrows* v. *Jackson*, 346 U. S. 249, 254 (1953), there is unconstitutional encouragement of the practice of writing racially restrictive cove-

nants when the state places "its sanction behind the [discriminatory] covenants." Enactment of a constitutional provision placing acts of discrimination by all those who own real property beyond the reach of the state courts, the State Legislature and every governmental agency in the state encourages discrimination in housing just as surely as placing race labels on the ballot "require[s] or encourage[s]" discrimination in voting. *Anderson* v. *Martin*, 375 U. S. 399, 402 (1964). In neither case is discrimination compelled by the state; in both, it is at least facilitated. This is not "neutrality." By adding Article I, Section 26 to its constitution, the state has placed its thumb on the scale and tipped it in favor of discrimination.

The encouragement and assistance which the new amendment affords to discrimination becomes even clearer upon consideration of the background events which led to its adoption. The measure was sponsored by the California Real Estate Association and the California Apartment Owners Association, and it was made clear during the efforts to obtain signatures on the initiative petition that the proposal was intended to nullify the Rumford Act and other fair housing laws.[35] The official ballot argument in favor of the measure disclosed the same purpose.[36] It is of course general public knowledge that the campaign respecting the proposed amendment was principally concerned with the issue of racial discrimination. In short, the purpose and

35. See, for example, Editorial in Vol. XLIV, Issue No. 2 of California Real Estate Magazine (Dec. 1963), the official publication of the California Real Estate Association.

36. The argument asserted that "Under the Rumford Act, any person refused by a property owner may charge discrimination." It urged voters to enact the proposed amendment in order to free property owners of any such charges.

expected effect of the measure was to free property owners from legal restrictions against discriminatory practices in housing. Indeed, racial considerations in the transfer of property constituted the only matters in controversy in respect to the amendment; neither proponents nor opponents were in disagreement as to other considerations that might motivate a landowner to decline an offer to buy or rent, and there was no occasion to propose legislation in this respect.

In light of this single-minded purpose of the new amendment, its constitutionality need not be evaluated in terms of its language alone. State laws or actions which seem neutral when considered in a vacuum are the equivalent of unconstitutional discriminatory state action where, as in the present case, it can be shown by reference to surrounding circumstances that the purpose and necessary effect is to bring about racial or religious discrimination. For example, in *Griffin* v. *School Board,* 377 U. S. 218 (1964), the State of Virginia closed its public schools in one county but continued to operate its public school system in the other counties. This Court found it unnecessary to consider whether the state had authority to close its schools for lawful reasons since it concluded, on the basis of external circumstances surrounding the closing, that that was not the case. As the Court stated (377 U. S. at 231):

> (The) public schools were closed and private schools operated in their place with state and county assistance, *for one reason, and one reason only*: (to discriminate against Negro children). (Emphasis added.)

In the light of this motivation, the state action took on an unconstitutional aspect.

To the same effect, see *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), where the circumstances surrounding a state reapportionment act were inquired into for the purpose of ascertaining whether the districts were composed "with racial considerations in mind." See also, *Guinn* v. *United States,* 238 U. S. 347 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).

The external evidence relating to the enactment of the new amendment inescapably leads to the conclusion that it was conceived, prepared, submitted for signatures, presented to the voters and enacted with a single purpose in mind—emasculating fair housing legislation and immunizing discriminatory landowners against state regulation. In these circumstances, it cannot be validly argued that the new amendment does not constitute state encouragement of racial discrimination. Property owners have been told in effect that the state law stands behind any refusal by them to sell or rent to Negroes or members of other minority groups. And this is indeed the case. If the new amendment is allowed to stand, no statutory or common law remedy will be available under state law against racial discrimination in housing sales and rentals. The Fourteenth Amendment, however, does not permit state involvement of this character in discrimination of so invidious a nature. For that reason alone, the amendment cannot stand.

D. Article I, Section 26 violates the Equal Protection Clause because it authorizes and facilitates racial zoning.

Fifty years ago, this Court held that the Fourteenth Amendment bars state and local legislation dividing residential areas into "white" and "colored" zones. *Buchanan*

v. *Warley,* 245 U. S. 60 (1917); see also, *Harmon* v. *Tyler,* 273 U. S. 668 (1927); *Richmond* v. *Deans,* 281 U. S. 704 (1930). Subsequently, in the *Shelley* case, *supra,* it barred attainment of the same result through court enforcement of privately initiated racial covenants. Article I, Section 26 has the effect of authorizing and sanctioning achievement of racial zoning by organized and concerted, or at least parallel, action by those who control the housing market.

The result of permitting discrimination by those who sell or rent housing is not merely to sanction occasional refusals here and there of individual housing units. The principal result, and the only one involved here,[37] is to sanction the imposition of "whites only" barriers at the entrances to apartment houses, suburban developments and even entire towns. Particularly with the phenomenal growth in the size of housing developments—both rental and for sale—since World War II,[38] the creation of whole new towns by a single company has become commonplace. Article I, Section 26 sanctions *de facto* racial zoning for these areas.

The *Buchanan* case dealt with zoning at the block level. Article I, Section 26 would in effect permit racial zoning by private owners from the block to the city level.

37. It should be remembered that the cases now before this Court do not involve the sale or rental of single family homes but the rental of apartments in multiple dwellings. Indeed, the California statutes affected by Article I, Section 26 do not reach discrimination by owner-occupants of single family homes. They apply only to the kind of housing that is under the control of those to whom housing is a business.

38. McEntire, *Residence and Race* (U. Cal. Press, 1960), pp. 176-177. See also "Construction Reports—Sale of New One-Family Homes," Series C25, Departments of Commerce and Housing and Urban Development, jointly—C25-26 (1963), C25-27 (1964), C25-65-13 (1965), page 1 of each report.

We submit that such *de facto* racial zoning cannot be permitted on the theory that it is initiated by private action and that the state does no more than facilitate it by permissive legislation. The structuring of communities is a governmental function—no different in constitutional significance from the control of voting which this Court protected from discrimination by private parties in *Smith* v. *Allwright*, 321 U. S. 649 (1944). There, this Court said (at 664):

> This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.

Here, it is the determination of occupancy patterns which the state is permitting by "casting its * * * [laws] in a form which permits a private organization to practice racial discrimination * * *." Here, as there, constitutional significance should be denied "so slight a change in form * * *" (321 U. S. at 661).

Directly applicable here, we submit, is the line of argument that controlled this Court's decision in *Marsh* v. *Alabama*, 326 U. S. 501 (1946). There, it was held that the Fourteenth Amendment guarantee of due process (in its application to freedom of expression) protected the distribution of literature on the streets of a privately-owned company town. The Court first noted that such distribution could not be barred by municipal action and then went on to say (at p. 505):

> * * * From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature.

The Court held that the same results could not be achieved by the action of a single owner, saying (at p. 506): "Ownership does not mean absolute dominion." Referring to the fact that the owner was acting as a private entity, the Court said (at p. 507):

> * * * Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

It concluded that the action of the state in effectuating the restriction by prosecuting those who distributed the literature violated the Fourteenth Amendment.

Here, it is accepted that the state could not limit occupancy in any area to persons of one race. Yet it is claimed that Article I, Section 26 can constitutionally permit owners of property to achieve the same result. We submit that the requirements of the Fourteenth Amendment cannot so easily be evaded.

The concept that the state cannot be viewed as a neutral party in the shaping of communities, and particularly the racial aspect of communities, is buttressed here by the fact that the state of California has never been neutral in this matter. Whatever may be said about whether a state vio-

lates the Equal Protection Clause simply by having a code of law which, by its silence, permits but does not discourage housing discrimination, that is not the case here. As shown in the brief for respondents (pp. 11-13), California has, for nearly a century, played an active role through its laws in affecting the racial composition of residential areas. It makes little difference that at times the state policy has been to favor segregation and in others to curb it. The essential fact is that California law has not been "neutral." It cannot now become "neutral."

E. The Fourteenth Amendment prohibits a state from disabling itself from fulfilling its constitutional responsibility to assure equality in housing.

Even if it were assumed that the Fourteenth Amendment imposes no obligation or responsibility on a state to enact or maintain urgently needed fair housing legislation, it would impose, we submit, at least the obligation to maintain the availability of the police power of the state to act in this area. In purporting to preclude exercise of that remedial power by adopting Article I, Section 26, California has done what this Court has said it may not do in the *Second Slaughter House Case, Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 753 (1883):

> No legislature can bargain away the public health or the public morals. *The people themselves cannot do it*, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the *special exigencies of the moment may require.* Government is organized with a view to their preservation, and cannot devest (sic) itself of the power to provide

> for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. (Emphasis added.)[39]

This is not to say that a state which has enacted fair housing legislation may never repeal it. There may, of course, be many situations in which the state could constitutionally repeal such legislation, such as when the Legislature finds that the need no longer exists. Here, however, the state has gone beyond repeal and has disabled itself from carrying out a responsibility laid upon it by the Fourteenth Amendment. It has thereby "parted with" the "legislative discretion" to deal with housing inequality "as the special exigencies of the moment may require." The *Second Slaughter House* case establishes that that may not be done.

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39. The unconstitutionality of the instant disablement is further demonstrated by analogy to other illegal disablements of fundamental power. For example a state canot disable its courts from hearing and granting relief on federal causes of action. *Testa* v. *Katt,* 330 U. S. 386 (1947). A government cannot disable its courts, even in a wartime emergency, from considering a defense in a criminal case that the law being enforced is invalid, unless an alternative and effective procedure for reviewing the validity of the law is available to the defendant. *Yakus* v. *United States,* 321 U. S. 414 (1944). Similarly, it is extremely doubtful that courts could be disabled from exercising the power to issue writs of habeas corpus in appropriate cases. See *Eisentrager* v. *Forrestal,* 174 F.2d 961, 965-966 (1949), reversed on other grounds, 339 U. S. 765 (1950).

POINT THREE

Article I, Section 26 violates the guarantee in 42 U. S. C., Section 1982 of the right of all citizens of the United States to equal opportunity to purchase or lease property without discrimination based on race.

Article VI, Section 2 of the United States Constitution, the Supremacy Clause, provides:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U. S. C., Sec. 1982 reads as follows:

> All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

If, as we believe, Section 1982 validly guarantees to all citizens the right to purchase or lease property free of discrimination based on race, it nullifies Article I, Section 26 to the extent that it purports to deny that right.

A. History of Section 1982

Less than four months after the adoption of the Thirteenth Amendment, Congress enacted the Civil Rights Act of 1866,[40] its first post-Civil War civil rights act. It did so by overriding the veto of President Andrew Johnson. The

40. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (1866).

Thirteenth Amendment had become law on December 18, 1865. It abolished slavery and sought to eradicate all forms and incidents of slavery and involuntary servitude.[41] It declared and vindicated those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.[42] Section 1 of the Civil Rights Act of 1866 read in part:

> That all * * * citizens, of every race and color * * * shall have the same right in every State and Territory in the United States * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * *[43]

The Fourteenth Amendment was not ratified until July 28, 1868. It read in part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2 and 5 of the Thirteenth and Fourteenth Amendments, respectively, empower Congress to enforce their provisions by appropriate legislation.

Thereafter, on May 31, 1870, Congress enacted a second Civil Rights Act[44] which sought to protect the recently freed

41. *Clyatt* v. *United States*, 197 U. S. 207, 217 (1905).

42. *Civil Rights Cases*, 109 U. S. 3, 22 (1883).

43. See fn. 40, *supra*.

44. Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (1870).

slaves from discrimination. Included in this Act as Section 18 thereof was a specific reenactment of the Civil Rights Act of 1866. This act was thereafter recast and embodied in its present form as it appears in Section 1982 of Title 42 in the general statutory revision of 1875 when it was designated as Revised Statutes, Sec. 1978.

B. The Thirteenth Amendment

The Civil Rights Act of 1866 was first enacted after the adoption of the Thirteenth Amendment and before the adoption of the Fourteenth Amendment. It is clear that the Thirteenth Amendment is applicable to the actions of private persons and there is no need for "state action" to trigger federal power and action under its terms. Even when this Court in the *Civil Rights Cases, supra,* was establishing "state action" as a prerequisite for invoking the protections of the Fourteenth Amendment and the civil rights acts enacted pursuant to Section 5 of that Amendment, it also conceded that the Thirteenth Amendment gave "power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure."[45] Hence, if the Civil Rights Act of 1866, our present Section 1982 of Title 42, which was enacted under the authority of Section 2 of the Thirteenth Amendment,[46] is read as being applicable to actions by private persons who violate rights

45. *Civil Rights Cases, supra,* 109 U. S. at 22. See also *United States* v. *Harris,* 106 U. S. 629 (1882); *Clyatt* v. *United States,* fn. 41, *supra.*

46. *United States* v. *Harris, supra,* 106 U. S. at 640.

it protects, without the slightest color of "state action", it is clear that such legislation is within the power granted to Congress by the Thirteenth Amendment.

That it should be so read, we believe, follows from the fact that it was enacted to implement the Thirteenth Amendment which was designed to end the incidents of slavery, however manifested. That is the implication of this Court's decision in the *Civil Rights Cases, supra*, 109 U. S. at 22:

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

C. The Fourteenth Amendment

As already noted, the Civil Rights Act of 1866 was reenacted as a portion of the Civil Rights Act of 1870. We respectfully submit that this reenactment did not impose on that Act the "state action" limitation of the Fourteenth Amendment and that, consequently, this Court's dictum in *Hurd* v. *Hodge,* 334 U. S. 24, 31 (1948) that Section 1982 applies to "governmental action" should not be treated as a limitation on the section.

The history of the adoption of the two Amendments plus the Fifteenth and the post-Civil War civil rights acts points

strongly to an intent to expand and strengthen the safeguards embodied in those Amendments and acts. The aim was to insure the end of all uses of private as well as public power to seek to hold the freed Negro slaves in subjection or to deny them any of the rights essential to make them free, full and equal participants in the body politic and the economic life of the country with their white co-citizens. The view of the 1866 Act contained in the *Hurd* dictum conflicts with that history and the intent of the framers of the Amendments and the acts. The reenactment in 1870 was clearly intended to extend the ban on private denial of the right to purchase and lease property to any similar action by the state. A contrary reading would transform into words of limitation, words of expansion of statutory remedy intended to meet new variations of the evil struck at. It would ignore the familiar canon of statutory interpretation that the reenactment of a statute effects no change in the law but merely continues the original law in force. 50 Am. Jur., Statutes §441.

Also relevant to any consideration of the impact of the reenactment of the 1866 Act in 1870 after the adoption of the Fourteenth Amendment, is an examination of the understanding of scholars close in time to the original events. A careful analysis of the legislative history of the Fourteenth Amendment based on a study of the debates in Congress and newspaper reports on the ratification debates in the various states, as embodied in a book published in 1908, led the author, H. E. Flack, to conclude that, when it was approved by Congress, its proponents in that body believed that under it "Congress would be authorized to pass any law which it might declare 'appropriate and necessary' to

secure to citizens their privileges and immunities together with the power to declare what were those privileges and immunities."[47] The author also expressed the view that the framers of the Amendment believed they were making a great change in the powers of the Federal Government and that "their failure to do this is due to the strained construction put upon their work by the Supreme Court."[48] He concluded,

> However futile were the efforts by Congress to give vitality to the Amendment as interpreted by itself and by those who had the most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. [The evidence shows that] according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by the States.[49]

Recent decisions of this Court reflect an acceptance by at least six members of the view expressed above about the applicability of the provisions of the Fourteenth Amendment to private action.[50] These decisions indicate that Section 5 authorizing Congress to enact appropriate legisla-

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47. Flack, *The Adoption of the Fourteenth Amendment* (Johns Hopkins Press, 1908), at p. 82.

48. *Id.*, at p. 69.

49. *Id.*, at p. 227.

50. *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Bell* v. *Maryland*, 378 U. S. 226 (1964); *United States* v. *Guest*, 383 U. S. 745 (1966). The first two of these cases are discussed in Robison, J. B., "The Possibility of a Frontal Assault on the State Action Concept," 41 *Notre Dame Lawyer* 455, 458-60 (1966).

tion to enforce the substantive guarantees of the Amendment is a broad grant of power and that, even if that Amendment, of its own force, does not forbid private discrimination, Section 5 comprehends legislation punishing private persons who for racial reasons engage in acts which interfere with Fourteenth Amendment rights. Included in those rights under the privileges and immunities guaranteed to all is the right to purchase or lease property. *Civil Rights Cases, supra; United States* v. *Morris,* 125 Fed. 322 (1903). In *Shelley* v. *Kraemer, supra,* this Court said (334 U. S. at 10-11):

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

In *U. S.* v. *Guest,* 383 U. S. 745 (1966), six members of this Court, although not speaking for the Court, indicated acceptance of the position that Congress has power under the Fourteenth Amendment and, therefore, has had, since the adoption of that Amendment, the power to enact legislation directed against private conspiracies interfering with the exercise of rights protected under the Amendment. Although Mr. Justice Stewart in his opinion for the Court refused to re-examine the doctrine of a requirement of state action, basing his decision on a finding that state action was involved in the defendants' conspiracy, Mr. Justice Brennan, concurring in an opinion in which he was

joined by the Chief Justice and Mr. Justice Douglas, noted that "a majority of the members of the Court express the view today that §5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy" (383 U. S. at 782). In a footnote, Mr. Justice Brennan noted that a majority of the Court took this view, consisting of the three Justices joining in his concurring opinion plus the three joining in Mr. Justice Clark's opinion, Justices Clark, Black and Fortas. These latter accepted Mr. Justice Stewart's construction of the indictment that it showed state action but also stated their belief that the specific language of Section 5 of the amendment empowered Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

If this is true in the case of rights under an Amendment purporting to protect against state action, it is necessarily true also with respect to rights established against all persons, private as well as state-authorized, as is the case under the Thirteenth Amendment. But in any case, it is clear that the 1866 Act, even if it is considered, *arguendo*, as involving Fourteenth Amendment rights because of its reenactment after the adoption of that Amendment, is within the constitutional power of Congress to enact and make applicable to private action. It appears also that the authority of the decision in the *Civil Rights Cases* and its limitation of the Civil Rights Act of 1875, and possibly those of 1870 and 1866, to state action, is now highly questionable if it has any weight at all.

D. The Effect of Section 1982 on Article I, Section 26

We submit that Section 1982, viewed in the light of the preceding pages, is directly at war with Article I, Section 26 of the California Constitution. Section 1982 secures to Negroes and all others the right, essential under our free democratic system, to purchase or lease real and personal property equal to that held by white citizens. Article I, Section 26 purports to secure to all owners of real property in California the right to decline to sell or lease their real property on any basis, including the race of the would-be purchaser. Each of these rights necessarily excludes and contradicts the other. The power to buy or lease real property without discrimination cannot exist and be secured as long as the right to sell or rent real property with discrimination is protected by law. One of these conflicting rights must yield. The Supremacy Clause requires that Section 1982 must prevail.

This conclusion is required regardless of whether Article I, Section 26 is found to represent "state action" or "neutrality" on the part of the state in the practice of racial discrimination in housing. If, as we believe we have shown, Section 1982 is a valid exercise of Congressional power, under the Thirteenth or Fourteenth Amendments, to prohibit discrimination by private persons, it is the "Supreme Law of the Land" and Article I, Section 26 is unconstitutional.

Conclusion

It is respectfully submitted that the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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March, 1967

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1958.

No. 482

NEIL FRITMAN, *et al.*, and CLARENCE TAYLOR,

Petitioners,

vs.

LINCOLN W. MULLEN, *et al.*, and WILFRED J. PRESTON-CAST and CAMILLA EVA PRESTON-CAST,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

REPLY BRIEF FOR PETITIONERS.

[redacted]

[redacted]

REPLY BRIEF FOR PETITIONERS.

Errata.

A. At pages 6 and 16, we quote portions of the initiative provisions of Article IV, Section 1 of the California Constitution as enacted in 1911. In the General Election of November 8, 1966, after the decisions below, that section was repealed as part of a broad constitutional revision, and new constitutional provisions for the initiative were adopted. The change, however, was of form not substance. The new provisions, so far as material here, were:

1. Article IV, Section 1: ". . . the people reserve to themselves the power of initiative and referendum."
2. Article IV, Section 22(a): "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." [Subsections (b) and (c) prescribe the procedures to be followed in enacting initiative measures.]
3. Article IV, Section 24(c): "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

B. At page 20, note 15, paragraph (a), delete Section 1 and substitute Section 22.

C. At page 36, second line of continuation of note 38, delete Section 1 and substitute Section 24(c).

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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

REPLY BRIEF FOR PETITIONERS.

I.
STATEMENT AND SUMMARY.

A. Preliminary Statement.

With the day of argument nearly upon us, we are continuing to receive, as of the time this is written, *amicus* briefs filed in support of Respondents' position. The contentions advanced by Respondents and their supporting *amici* are almost too numerous to catalogue. They are in many respects inconsistent with one another. More importantly, many of them are in no way material to the resolution of the issues which need be resolved in the cases presently before this Court.

Time does not permit a comprehensive or exhaustive reply to all of the contentions advanced by our opponents, particularly in light of the multiplicity of issues they raise. However, we feel that it is incumbent upon us to endeavor to restore some perspective to the issues which actually require decision in these cases. It is to that end that we direct this reply brief.

B. Summary of Argument.

Section 26 had but two purposes and effects: The repeal of a small portion of pre-existing antidiscrimination legislation (*i.e.*, portions of the Unruh and Rumford Acts), and the reservation to the people acting through the initiative process of the power to enact future regulation of the exercise of discretion by the owner of private residential property in the selection of the persons to whom he will or will not sell, lease, or rent his own property.

The cases before this Court have not placed in issue any possible application of Section 26, (1) to the conduct of persons other than the owners of residential real property, such as brokers, (2) to any conduct on the part of the State or any of its agencies, (3) to any transaction in which the slightest argument of State "involvement" in, or "responsibility" for discrimination can properly be advanced, or (4) to any joint or conspiratorial activity. The sole questions, therefore, which confront this Court are whether, under the circumstances of these cases, the equal protection clause nullifies the repeal of pre-existing legislation by the enactment of Section 26, and whether, under the circumstances of these cases, the equal protection clause prohibits the reservation of political power to the people.

We emphasize the qualification "under the circumstances of these cases" because, as noted above, many of the problems hypothesized by Respondents and their supporting *amici* are wholly unrelated to the circumstances of these cases. They, therefore, neither can be nor should be considered by this Court in reviewing the decisions below.

We also emphasize that qualification because, as we shall demonstrate, Respondents and *amici* present an inaccurate and misleading version of the *milieu* in which Section 26 was passed and the circumstances out of which these cases arise. It is critical to a proper application of constitutional principles in the cases before this Court that the cases be viewed fairly in their true context. It is highly significant that these cases come to this Court not from a state which has been recalcitrant or even passive in its approach to civil rights, but from a state which has, unquestionably, been in the vanguard of progress in the field of human and racial relationships. It is equally important to recognize that California did not, by the enactment of Section 26, nullify the tremendous gains it has made in the war against discrimination. Section 26 does not effect a wholesale nullification of California's pervasive body of antidiscrimination law. Section 26 merely repealed a small portion of those laws, a portion dealing only with a narrow area of activity, the exercise of discretion by a property owner in selecting the persons to whom he will or will not sell, lease or rent his own residential property. Far from being a novel principle, the resulting policy of non-regulation of freedom of choice by the owner in the disposition of his own private property was a universally accepted ingredient of the concepts of

liberty and property from the beginnings of modern democracy until 1959 when certain states first adopted fair housing laws. It is the same policy that exists in a large majority of the states. Surely something more than the social, economic and emotional views argued by Respondents and *amici*—arguments more appropriately directed to the people, to Congress, or to a legislature—is required to support the contention that such a long-standing common law rule is suddenly a violation of the Fourteenth Amendment.

II.

THE ISSUES.

Article I, Section 26 of the California Constitution was an initiative measure (Proposition 14) adopted by a vote of 4,526,460 to 2,395,747 in the General Election of November 3, 1964,[1] after the Court below had refused to prohibit the Secretary of State from placing it on the ballot.[2]

It was passed after an intensive, widely publicized, and emotionally-charged campaign in which both its supporters and opponents numbered among their ranks

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[1]"California Statement of Vote, General Election, November 3, 1964", compiled and certified by Frank M. Jordan, Secretary of State of the State of California, p. 25. The support for § 26 was in no sense confined to any geographical portion of the state; a majority of the votes cast in all but one of the 58 counties of the state favored adoption, the margin in the sole exception being but 19 out of 3,091 votes cast. *Ibid.* Indeed, 370 of the 393 incorporated cities in the state voted in favor of § 26, and the measure was defeated by less than 100 votes in 12 of the 23 cities voting against it. "State of California, Supplement to Statement of Vote, General Election, November 3, 1964", compiled and certified by Frank M. Jordan, Secretary of State, pp. 65 through 79.

[2]*Lewis v. Jordan* (Calif. S.Ct. 1964), No. Sac 7549 [Unreported Minute Order of June 3, 1964], R. 18-19.

leading newspapers and radio stations, respected and influential religious, civic and political organizations and widely known and respected individuals.[3]

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[3]Comment, 19 Stan. L. Rev. 232, 238 ["Proposition 14 quickly became the most controversial California issue on the November ballot. . . . 'No on 14' groups drew to their cause an impressive list of organizations : . ." The author identifies the organizations as the California Teachers Association, California Congress of Parents & Teachers (State PTA), California Labor Federation (AFL-CIO), League of Women Voters of California, Council of Churches, Roman Catholic Archdiocese of San Francisco, and Board of Rabbis.]

The federal government was also active in opposing Proposition 14, the Federal Housing Administrator announcing his prediction that the United States would cut off urban renewal and development funds if the measure passed (Beck, "Prop. 14 Called Peril to Urban Renewal Fund", Los Angeles Times, October 20, 1964, Part I, page 26), a threat that was carried out upon enactment of §26 (Foley, "U.S. Funds for State Renewal Jobs Cut Off", Los Angeles Times, November 11, 1964, Part I, page 2). The supporters of §26 included the Los Angeles Times. "Times Editorials", Los Angeles Times, February 2, 1964, §G, page 6 (attached as Exhibit A to the *Amicus* Brief submitted on behalf of Attorneys for the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL-CIO, Region 6, and Paul Schrade, its Regional Director). In its endorsement of the measure, The Times declared:

> "The immediate effect of this proposed amendment, if ratified by a majority of the voters, would be to nullify portions of the Rumford Act (relating to discrimination in housing) and the Unruh Act (dealing with real estate brokers)."

Noting that it had already urgently espoused the granting of all minority rights guaranteed under the U.S. Constitution, particularly in connection with the implementation of equality in education and employment, The Times observed that the privilege of using and disposing of private property in whatever manner he deems appropriate is one of man's most ancient rights in a free society and that it felt strongly "that housing equality cannot safely be achieved at the expense of still another basic right." Though declaring it morally wrong to deny housing to anybody, regardless of race, color or creed, The Times favored §26 and its repeal of conflicting provisions of the Rumford and Unruh Acts because "unofficial laws designed to hasten the process of social, as distinct from civil, justice can only exacerbate the situation—and, in the opinion of The Times, defeat their very purpose."

As the Ballot Argument in favor of the measure makes plain (App. 3-5),* it was intended to reinstate the common law rule of freedom of choice in a limited sphere of private conduct, *i.e.* the exercise of discretion by the owners of residential real property in the choice of persons to whom they would or would not dispose of their own residential property; and for the further clear purpose of repealing then-existing legislation restricting that right, particularly the recently-enacted Rumford Act.[4] Though it proscribes any state action that would deny, limit or abridge the freedom of individuals in the narrow area of conduct which it affects, Section 26 remains subject to modification or repeal by subsequent vote of the people, as even Respondents concede. In this respect, it should be noted that by the provisions of Article Four, Section 1 of the California Constitution:

> "No act, law or amendment to the Constitution, adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure".

Acordingly had the measure proposed a statute rather than an amendment to the California Constitution, it

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*References to "App." herein are to the Appendix to the Opening Brief for Petitioners, not to the Appendix to the Petition for Certiorari.

[4]The court below so found: "Proposition 14 was enacted . . . with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate. . . ." R. 18. Respondents and *amici* concede and indeed contend that Section 26 was passed for the purpose, at least in part, of repealing conflicting provisions of certain antidiscrimination legislation existing at the time of its enactment (more specifically, portions of the Unruh and Rumford Acts).

could still be repealed or modified only by vote of the People.

Simply put, therefore, the questions before this Court are whether, under the facts of these cases and the equal protection clause,

(1) Section 26 is an effective repeal of certain portions of then-existing antidiscrimination legislation which the state had the power but clearly no constitutional duty to enact,

(2) Section 26 lawfully reserves to the people the exclusive power to take future action that would restrict the right of an owner of private residential real property to freely select in his sole discretion the persons to whom he chooses to sell, lease, or rent his own property. If, contrary to well-established principles, this Court should determine that the reservation of state power to the people acting through an initiative system is justiciable and, further, that it is unconstitutional, then a third question would need to be resolved, namely, whether Section 26 is nevertheless lawful, valid and effective as a repeal of the conflicting portions of the Rumford and Unruh Acts, as was manifestly the intention of the four and one-half million people who voted in favor of Section 26.[5] These, then, are the questions which must be resolved now.

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[5]That intent is manifested in the severability clause in § 26 itself, in the official Ballot Argument in favor of § 26, and in the endorsements and arguments in favor of §26 which were presented to the people, some of which are presented and referred to in the various briefs filed by respondents and *Amici*. There are no facts whatever, either in or out of the record, indicating that § 26 was not intended to repeal pre-existing conflicting portions of the Unruh and Rumford Acts, regardless of what further effect § 26 might be permitted to have. See generally *infra*, pp. 32-42.

Actually, the issues may be even narrower. Both of these actions were suits brought under the provisions of the Unruh Act (App. 8-9) for injunctive relief and damages against the Petitioners who are each individual owners of private residential property.[6] If that statute is now in effect, following the adoption of Section 26, then the judgment of the Court below should be affirmed. If, however, Section 26 was intended, among other things, to accomplish a *pro tanto* repeal of the Unruh Act—which is obvious and admitted—then the dispositive question in these cases is whether Section 26 is valid to accomplish that repeal. The Court below held it was a denial of equal protection to apply Section 26 so as to nullify the previous legislation. We ask this Court to disavow so startling a proposition of federal constitutional law and to uphold the validity of Section 26 in the only respect in which it affects the rights of the parties in these two cases: At the very least the People of California have the power to repeal the pre-existing legislation.

Section 26 does not protect or affect, and neither of the cases now before this Court involve, any governmental or traditionally public function, any joint or conspiratorial activity, any public or private conduct or pressure having the purpose or effect of inducing discriminatory conduct by coercion, persuasion or encouragement or the purpose or effect of discouraging nondiscriminatory conduct in any manner, or any act other than the individual act of the owner of private residential real property in selecting the persons to whom he will or will not sell, lease, or rent his own private,

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[6] *Mulkey v. Reitman*, R. 14; *Prendergast v. Snyder*, R. 72.

residential property.[7] Much of the opposition by Respondents and *amici* to Section 26 consists of an array of imaginative problems posed without reference to the fair meaning and intent of Section 26 and wholly unsupported by the facts of the cases presently before this Court.

III.

THE CONTEXT IN WHICH SECTION 26 SHOULD BE JUDGED.

The Court must be aware that it is a distortion of the character of California to portray it, as do Respondents and the several *amici,* as a place where racial discrimina-

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[7]The decisions of the court below have been criticized for failing to recognize the wide middle ground within which discrimination is not constitutionally prohibited though it is subject to regulation by the state should the state decide to exercise its power. Thus, between situations in which the state is so involved in an activity as to fairly be responsible for any ensuing racial discrimination on the one hand, and situations involving only purely private conduct (such as the admission of guests to a home or the selection of residents in a religious institution) on the other, "there is a broad middle ground where the individual has no constitutional right to discriminate nor do others have a constitutional right to be free from discrimination. The failure to recognize this broad middle area is the basic difficulty in current analysis of the role that state action plays in eliminating discrimination." Williams, "*Mulkey v. Reitman* and State Action", 14 U.C.L.A. L. Rev. 26 (1966). As Professor Williams observes:

> "The danger in an analysis such as that in *Mulkey v. Reitman* is the failure to recognize the broad middle area of individual discretion to discriminate until the state, as a matter of public policy, stops such discrimination. The freedom to discriminate is individuality. And while the state does have the power to forbid discrimination in many facets of life, and thus to curb individuality, it should exercise this power wisely and with restraint. It has done so, for example, in public accommodations, equal employment opportunity, and fair housing legislation. But the policy should also be subject to revision and review by the people in that broad middle area where discrimination by the individual is not constitutionally prohibited." *Id.* at 36.

tion is rampant, where "ghettoes" are steaming forth discontent over private racial discrimination in housing and where patterns of racial segregation have been caused by reason of past state conduct or lack of official concern or both: as a society riven with fixed community customs of racial bigotry in housing; and as a place where the continued existence right now of fair housing legislation is absolutely critical to the long-range protection of California minorites. Respondents and *amici* portray California through a clouded glass. That in so doing they unfairly discredit the state is of less significance here than the possibility that the distorted picture may obscure the true issues and thereby prevent the proper application of constitutional principles in the decision of these cases.

We do not represent California to be a state in which the enormously troubling problems of the relationships between people of differing races, creeds, or political beliefs have been resolved. The record here shows, however, that the people and State of California have strived mightily to deal with the problems of racial discrimination. Their effort is in part reflected by the many varied and effective laws preventing discrimination in a wide variety of contexts.[8]

[8]California forbids discrimination and statements that might reflect or encourage discrimination in such varied context as applications for marriage licenses, restrictive covenants, teaching and entertainment around public schools, selection of textbooks, the hiring or appointment of teachers, registrars of voters, civil service employees, and classified employees, access to beaches, dealings with lessees and purchasers of urban renewal property, the sale or cancellation of insurance, the employment of persons by contractors engaged in public works, and the employment of persons generally (with certain exceptions for employers of less than five persons and social, fraternal, charitable, educational, and religious associations and certain other limited types of employers). California legislation also authorizes counties and cities

Indeed, notwithstanding the adoption of Section 26, California continues to have more comprehensive legislative prohibitions against discrimination in housing than 41 other states.[9] In November of 1965 (after Section 26 had been in effect for one year), a survey covering at least 95% of all the residential property sold through multiple listings in the State of California disclosed that only 1,036 listings out of 185,768 (or 0.558%) contained discriminatory restrictions.[10]

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to expend funds to promote racial tolerance and preserve peace among citizens of all races. The state itself recognizes the need for elimination of racial discrimination in housing as a factor to be taken into consideration in any redevelopment program. See generally App. 12-14.

[9]See Op. Br. for Pet. p. 13 and App. to Pet. for Cert. 15-24.

[10]"A Minority Report, CREA Reports Restricted Listings at .6% of total", Los Angeles Times, March 27, 1966, § J, p. 2:

> "An almost unlimited supply of houses for sale is available to Negroes and other minorities who have the financial ability to buy them, according to a survey released by the California Real Estate Assn.
>
> "Burt Smith of Bellflower, CREA president, discussed the survey during the Association's quarterly meeting of its board of directors in Sacramento, last week.
>
> "He said CREA queried its 176 real estate boards throughout California to learn how many houses for sale through their multiple listing services were racially restricted by their owners. The survey covered the first 11 months of 1965.
>
> "The answer, with 170 boards reporting, came to 1,687 listings out of a total of 286,406, or approximately .6% (.589).
>
> "'This was a follow-up' Smith said, 'of a sampling we took earlier of 50 representative boards for the first 10 months of 1965. The result was almost identical. Total listings for those 50 boards was 185,768 with 1,036 restricted, or .558%. The highest rate for any one board was 6%.'
>
> "Six Boards Silent
>
> "He said the six boards not reporting on the latest survey were small and would not 'significantly alter' the finding, representing only 1,809 of a total CREA membership of 54,768 at that date.

(This footnote is continued on the next page)

Neither Respondents, nor the Court below, has ever questioned our assertions that there is no statute, regulation, rule, municipal ordinance or policy of any governmental unit or officer in California which requires, permits, encourages or sanctions racial discrimination; or that the announcements, both official and unofficial, of our highest State constitutional officers, as well as prominent leaders in the Executive and Legislative Branches of our State Government and the statements of the statewide chairmen of both the leading political parties, and the pronouncements of the California Supreme Court establish that every element of State Government in California strenuously opposes discrimination on the grounds of race, color, creed or national origin. No claim can honestly be made that there is a state-sponsored "mosaic" of discrimination in California. On the contrary, it has a comprehensive official policy against racial discrimination. To be sure, a great deal remains to be done before it could fairly be said

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" 'Multiple listing services offer the largest pool of housing for sale by far,' he stated, 'and most of them are operated by real estate boards that are members of our association.'

"Smith pointed out that real estate agents are obligated to show housing to any qualified buyer, the only exceptions being those stipulated by the owner. Any violation of this obligation makes them liable under the Unruh Act [under provisions of that act not affected by Section 26]."

See also, " 'Unlimited' Housing for Minorities", San Francisco Sunday Examiner & Chronicle, March 27, 1966:

"Smith concluded from the survey that housing for sale, 'at least that being offered through CREA member boards' multiple listing services,' is available to qualified Negroes and other minority races.

" 'When Proposition 14 was passed,' he said at the Sacramento meeting, 'it gave owners of residential property freedom to choose the buyer or renter of his property. This survey indicates, where the sale of housing is concerned, that the owner is not using this freedom to discriminate against buyers of another race or religion.' "

that racial discrimination has been completely eliminated in California, but that should not obscure the fact that, relative to other states of the union, great strides have indeed already been made.[11]

Eastern reporters of the tragic civil disturbances widely but somewhat inaccurately known as the Watts Riots, bore witness to the progress made by the Negro in the Los Angeles community. Perhaps the most complete was that of Theodore H. White in his syndicated column of August 22, 1965:

> "[I]n Los Angeles, Negroes have lived better than in any other large American city, with the possible exception of Detroit.
>
> "One approaches the 50-square-mile rectangle of south central Los Angeles where live its 400,000 Negroes (density 26 per acre, in contrast to Harlem's 222 per acre) with the word 'ghetto' firmly fixed in mind. Then one drives through mile after mile of open streets, without a tenement, a flat, or a single multiple dwelling. Green lawns, palm trees, flower beds, white frame houses, succeed each other mile after mile, broken by open spaces, airy school houses, with huge playgrounds, large parks with swimming pools.

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[11]Even respondents have conceded that "since earliest days of statehood" California has had a "consistent pattern of treating racial discrimination as against public policy." Br. in Op. to Pet. for Cert. 16. The Attorney General of the State of New York likewise concedes at p. 2 of his Amicus Brief that California has taken great strides in this field in recent years. More significantly, the relatively good life available to Negroes in California doubtless goes far to explain the enoromous influx of Negroes from various other states into California in recent years. While that increase has created problems, many of them severe, it would not have occurred had the Negro's plight not been far better in California than in the places from which he comes in ever increasing numbers.

"To Harlem Negroes, squeezed in the dingy red-brick cubicles north of Central Park, where the rat is the symbol of the white man's power structure, such living is entirely imaginary. When one recalls the conditions of Chicago's South Side, where the summer stink of the stockyards can brood like a living curse on crowded Negro two-family houses, the smog of Los Angeles seems comparatively benign.

"When one adds to outer impressions the statistical comparisons, the mystery grows. Income per capita for Negroes (while heavily below that of white Angelenos) is higher than for any other Negro community in the country, again with the possible exception of Detroit. Crime among Negroes is lower in Los Angeles. Welfare burden is lower. Illegitimacy rates, though high, in no sense approach the terrifying rates of Negro illegitimacy in the East where, in New York's Harlem, it peaks at an out-of-wedlock birth rate of 44%.

"To this city in the sun, Negroes by the thousands have flocked in the past 15 years, doubling in number in Los Angeles city in the decade 1950-60, from 171,209 to 334,916, expanding steadily from areas of original settlement south, west and north, filling nine distinct communities in the 30 communities that the city's planning commission calls the Central District.

"One can trace this movement—from the Watts community, an infected pocket of misery, unemployment and despair where new arrivals from the South congregate, to the surrounding communities that expand through white neighbor-

hoods north and south, to the magnificent old homes on Washington Boulevard, or the distinguished new architecture of Baldwin Heights. Los Angeles is a city in progress—and Negro progress here has been spectacular.

"One can add other ingredients: an open and easy tolerance; restaurants, museums, theaters and civilized pleasures open to all who pay the price.

"And one must cap the picture with politics: a mayor elected first by an overwhelming Negro vote and reelected with substantial Negro votes; a governor known as champion of Negro rights; a five-man police commission one of whose members is a Negro. And, lastly, a 15-man city council of which three members are Negro. Los Angeles is the only city in the country where Negroes (with 13.5% of the population) are over-represented rather than under-represented as everywhere else."[12]

Similar was the report of Larry Hall (a Negro news reporter for Station WJRZ in Newark, New Jersey):

"Even after covering the Harlem riots a year ago, this is still a new experience for me. I feel strange walking through Watts, not seeing any traces of an asphalt jungle, rat-infested tenement houses, and strings of dark, nerve-racking alleys."[13]

Section 26 thus comes to this Court from a state whose official policy is and for many years has been one vigorously opposed to racial and religious discrimination: It is in that context that this Court is asked to de-

[12]Los Angeles Times, August 22, 1965, § G, p. 1.
[13]Los Angeles Times, August 14, 1965, § A, p. 22.

cide whether Section 26 is unconstitutional because it had the effect of repealing certain features of fair housing legislation which had been previously enacted by a legislature which surely believed it was acting within its legislative discretion and not under the compulsion of a federal constitutional mandate.

It is in that context and not in the fanciful imaginings of Respondents and *amici* that this Court is asked to decide whether Section 26 is forbidden by the Fourteenth Amendment because the people of California have decided that for now, they themselves shall have the exclusive right to determine whether the coercive power of the state shall be employed to restrict the rights of private individuals in determining to whom they will or will not sell, lease or rent their own residential property.

IV.
RESERVATION OF LEGISLATIVE POWER BY THE PEOPLE.

Since 1911, the people of California have reserved to themselves "the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature." California Constitution, Article IV, Section 1. The *pros* and *cons* of "direct law making" have been long debated, and numerous people have reviewed the products of the initiative and referendum system in California.

Professor Max Radin observed, in an article on the initiative and referendum entitled "Popular Legislation in California: 1936-1946" in 35 Calif. L. Rev. 171 (1947), at pp. 171-172:

> "The introduction of this system of popular legislation into California was part of the program of

> the Progressive movement, then captained by Hiram Johnson. The older among us remember the bitterness of the attack made against it and the prophecies of disaster that accompanied it. It was chiefly attacked as a violation of the 'republican form of government' guaranteed by the United States Constitution. And even after the decision of *Pacific States Telephone and Telegraph Co. v. Oregon* the fantastic doctrine that 'republican' excludes 'democratic', a doctrine which manages at the same time to contradict history, etymology and common sense, is still demummified from time to time and seriously presented to Americans."

In *The Initiative and Referendum in California* (University of California, 1939), the authors (V. O. Key, Jr. and Winston W. Crouch) state at page 565:

> "It is difficult to categorize the propositions adopted by the initiative. On the whole, they appear to be neither more drastic nor less intelligent in intent than acts which have been adopted by the Legislature."

Based on a detailed review of the results achieved by initiative measures during the decade, Professor Radin concluded that no predilection was observable in favor of measures that could be called popular, many of the measures having had to do with technical matters; that in at least 12 of the 33 cases in which popular feeling was evident, the result of the vote was contrary to what had been commonly believed to be the popular view; and the participation of the electorate in direct legislation in California since 1935 was very high. At

page 190, Professor Radin declares on the basis of his investigation:

> "The inferences which I felt justified in making in the former article ['Popular Legislation in California,' 23 Minn. L. Rev. 559 (1939)] seem amply confirmed by the four elections that have taken place since. Direct legislation can deal with complete competence—at any rate with a competence equal to that of representative legislatures—with the technical and routine problems which need legislative intervention. So far as large problems of public welfare are concerned, it is markedly more likely to reach a fair and socially valuable result.
>
> "One thing is clear. The vote of the people is eminently sane. The danger apprehended that quack-nostrums in public policy can be forced on the voters by demagogues is demonstrably nonexistent. The representative legislature is much more susceptible to such influences.
>
> "The evils of democracy that enemies of our system inveigh against are really abuses of the representative system. These abuses can doubtless be cured without destroying the theory of representation. Some of them, however, can clearly be cured by more democracy. Popular legislation as practised in California since the great days of Hiram Johnson is a demonstration of that fact."

The initiative and referendum are not peculiar to California. They "exist almost everywhere in some form. The town meeting in New England is a pure initiative. Twenty-two of our states have comprehensive initiative and referendum at a state level, a local level, or both [as of April, 1951]. In these states initiative and refer-

endum occupy an important position in the political scene."[14]

In the reapportionment cases of recent years, this Court has itself emphasized the importance of equal representation of the citizens in the processes of government. That ideal is nowhere realized more fully than in the initiative and referendum procedures. There and there alone can it accurately be said that every man has an equal voice in the enactment of legislation. It is therefore ironic that respondents and *amici* should charge that Section 26 denies respondents the equal protection of the laws by reserving to the initiative process the enactment of future legislation affecting the discretion of the owners of private residential property in selecting the persons with whom they will deal with respect to their own property.

Whatever may be said of the merits of the initiative system, however, objections to that system are not properly directed to this or any court. Insofar as respondents and *amici* contend that the reservation of control over state power in this limited sphere of activity constitutes an improper withdrawal or allocation of that power, they can find constitutional support only in the republican form of government clause. As this Court declared in *Coleman v. Miller,* 307 U.S. 433, 455-456.

> "[In] Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U.S. 118, 56 L. ed. 377, 32 S. Ct. 224, we considered that questions arising under the guaranty of a republican form of government had

[14]Comment, 3 Stan. L. Rev. 497, 499 (1951).
For current analysis of California provisions, see also Comment, 54 Calif. L. Rev. 1717 (Oct., 1966).

long since been 'definitely determined to be political and governmental' and hence that the question whether the government of Oregon had ceased to be republican in form because of a constitutional amendment by which the people reserved to themselves power to propose and enact laws independently of the legislative assembly and also to approve or reject any act of that body, was a question for the determination of the Congress. It would be finally settled when the Congress admitted the Senators and Representatives of the State."[15]

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[15]The briefs filed by Respondents and others on their behalf articulate in various ways their objections to the decision of the people to reserve to themselves the power to enact future regulation over the exercise of discretion by the owners of residential property in the selection of the persons with whom they will deal in selling, leasing, or renting their own property. None of the objections is of constitutional dimension, and most reflect untenable analysis and depend upon debatable views in the field of policy. Thus:

a. The contention that the reservation of power is analogous to a "freeze" of the law (see brief filed on behalf of the United States, pp. 27-28), ignores the fact that Section 26 is not unlike any other initiative measure passed in the State of California. It is subject to amendments or repeal at any time by subsequent resort to the initiative process. California Constitution, Article IV, Section One.

b. The contention that the minority groups whom Respondents contend are adversely affected by Section 26 could not obtain sufficient votes to enact a subsequent initiative measure assumes, indeed expressly assumes, that the minority groups stand alone in the area of Civil Rights and cannot hope to muster sufficient votes to pass any measure by popular majority. That assumption is not only plainly inaccurate, but an unjust, perhaps even ungrateful reflection upon the recent history of Civil Rights activity in this country. Indeed, the vote against Proposition 14 in the California election was 2,395,747, and necessarily included vast numbers of persons not members of the minorities to which Respondents refer. Obviously, the mere fact that a minority is unable to persuade sufficient numbers of others to join with it to constitute a majority in passing upon measures which it considers vital raises no constitutional issue unless Respondents,

Reservation of power to the people acting through the initiative process, of course, in no way constitutes a withdrawal of state power. In California as throughout this nation, all political power is derived from the

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as members of the minority, are thereby denied constitutionally protected rights.

c. The contention that the reservation of power to the people destroys the power of local governments to adopt policies regulating discrimination in private housing is subject to the same criticism. It is of constitutional dimension only if there is a constitutional right to local option. Yet it is well established that there is no constitutional impediment to pre-emption on a federal or state level in various fields of activity. See, *e.g.*, the following cases upholding federal pre-emption: *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347 (regulations regarding delivery of telegrams); *Campbell v. Hussey*, 368 U.S. 297 (regulations concerning grading of tobacco); *Schwabacher v. United States*, 334 U.S. 182; *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (control of unfair labor practices); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (control of labor relations even where NLRB refuses jurisdiction); *International Shoe Co. v. Pinkus*, 278 U.S. 261 (bankruptcy statute); California likewise has upheld pre-emption with reference to right-to-work laws, *Chavez v. Sargent*, 52 Cal. 2d 162, 339 P. 2d 801 (disapproved on other grounds); *Petric Cleaners, Inc. v. Automotive Employees, etc.*, 53 Cal. 2d 455, 349 P. 2d 76; intoxication, *People v. Lopez*, 59 Cal. 2d 653, 381 P. 2d 637; and regulation of crime, *In re Lane*, 58 Cal. 2d 99, 372 P. 2d 897 and *In re Mingo*, 190 Cal. 769, 214 Pac. 850. Indeed the California courts have gone so far as to state that any doubt with regard to the question of whether the state has pre-empted a field of activity is to be resolved in favor of the State. See *Ex parte Daniels*, 183 Cal. 636, 639, 192 Pac. 442, 444; and *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 681, 349 P. 2d 974, 979. Obviously, the allocation of political power as among the central state government and its various political subdivisions is as much a political question as is the allocation of power among the various branches of the state government. Respondents show no basis for asserting any constitutional right to local option. The figures summarized in n. 1, *supra*, also demonstrate that there is no evidence that any substantial deviation from the policy of Section 26 could be expected even if action in this field were left within the sole discretion of the counties or cities of the state. Certainly neither of the Respondents has demonstrated that his position would be improved if his city or county retained the right to make its own independent determination of whether to enact anti-discrimination legislation.

people, and nowhere has it been held that the people cannot reserve to themselves the right to exercise that power, as through an initiative process. As the California Supreme Court declared in upholding the constitutionality of the initiative process on the city level in that state:

> "The fact that accomplishment of amendment or repeal through the initiative process may be cumbersome or difficult is not the product of the alleged restriction of future discretion; it is merely a characteristic of the kind of legislative system the Constitution of this state has ordained. The significant fact is that the full legislative power of the city remains entirely unimpaired, ... The ordinance, therefore, no more limits future discretion than does any other prohibitory ordinance admittedly within a city's power to enact."[16]

Section 26 cannot therefore be deemed unconstitutional because it has the effect of requiring the consent of the people through the initiative process for the enactment of future restrictions on the freedom of individuals in the narrow area of selecting the persons to whom they will or will not sell, lease, or rent their own private residential real property. Thus, the dispositive question is whether Section 26 violates the Fourteenth Amendment by virtue of the fact that it repealed a small portion of the antidiscrimination legislation existing at the time of its passage.

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[16]*Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30, 396 P. 2d 41, 45.

V.

REPEAL.

Analysis of the decisions below establish that the California Court found but one vice in Section 26. That was the repeal of certain pre-existing antidiscrimination legislation, particularly the portions of the Rumford Act directed at the owners of certain types of private residential property in the disposition of their own such property. (See Op. Br. for Pet. 40, 55.)

In the first place, the discriminatory conduct in *Mulkey v. Reitman* occurred and the action for damages and injunctive relief was commenced in 1963, prior to the enactment of Section 26.[17] Obviously, the enactment of Section 26 did not and could not have "encouraged" Mr. Reitman to discriminate against Negroes.

In the second place, in the companion case of *Hill v. Miller* (App. 15), the court below affirmed a judgment of dismssal on demurrer in the action brought by the Negro tenant, disregarding the landlord's stated reliance on Section 26 in the Notice to Quit which he served on Mr. Hill. (App. 16, 18.) In support of its holding, the Court found that the discrimination there involved was "private", that the Fourteenth Amendment did not impose upon the State the duty to take positive action to prohibit private discrimination, and that the State had not by action of the legislature or the people made such private acts of discrimination unlawful (the Unruh and Rumford Acts being inapplicable to the facts of that case).[18]

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[17]R. 2, 3, and 15.

[18]App. 15, 17-18.

When the opinions of the court below in the cases here on certiorari are read in light of *Hill v. Miller* it is undeniable that the court below held Section 26 violated the Fourteenth Amendment because, and only because, it repealed pre-existing antidiscrimination legislation that was applicable to the *Mulkey* and *Prendergast* cases but not to the *Hill* case. There is no finding in any of the cases below that the enactment of Section 26 "encouraged" in any causal sense the private acts of discrimination complained of by respondents in these cases. The question confronting this Court is, therefore, whether the Fourteenth Amendment prohibits a state from modifying or repealing any part of its body of civil rights legislation when the state was under no constitutional mandate to enact the legislation in the first place. We submit that to state the question is to answer it, and to answer it in the negative.

It should be obvious that no single state has the power to amend the Constitution of the United States or the Fourteenth Amendment to that Constitution.[19] It is well established, and indeed conceded by the court below,[20] that the Fourteenth Amendment imposes no affirmative duty on the states to enact legislation prohibiting racial discrimination in purely private affairs such as the sale, rental, or lease of privately owned and

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[19]Constitution of the United States of America, Article V.

[20]"The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here." *Hill v. Miller*, App. 17. The court held that the Negro plaintiff's allegations of discrimination failed to state facts sufficient to constitute a cause of action because "[a]lthough the state, by action of the Legislature or the People, may make such private acts of discrimination unlawful, it has not done so" (App. 17) and "[p]laintiff is further unable to plead facts which would afford him relief under any decisional law." (App. 18).

operated residential real property.[21] Therefore, California's enactment of the Unruh and Rumford acts was a discretionary exercise of its police power, and the enactment of those statutes in no way affected respondents' substantive rights under the Fourteenth Amendment (except, of course, that so long as those statutes remained in effect, respondents' rights to due process and to equal protection of the laws included the right to due and even-handed application of those statutes as well as of the other laws of the State of California). Similarly, since those statutes possessed none of the authority of a constitutional enactment on either the state or federal level, they could be amended or repealed at will by either the representative legislature or by the people themselves acting through initiative or referendum. *Blotter v. Farrell,* 42 Cal. 2d 804, 270 P. 2d 481. There is no constitutional impediment to the removal of legislation which the state was never under a constitutional mandate to enact or maintain.

All parties before this Court are agreed that one of the primary purposes of the proponents of Section 26 was the *pro tanto* repeal of the Rumford Act.[22] It is likewise uncontested that public opposition to that Act included serious objections to the time and manner of its enactment and to many of its procedural aspects, as well as substantive objections to governmental sanctions infringing upon the freedom of a residential property owner to select the person with whom he will or will not deal in connection with his own private residential property. The procedural objections were not trivial.

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[21] See generally Op. Br. for Pet. 28-37.

[22] See n. 5, *supra.* Of course, the court below so held. *Mulkey v. Reitman,* R. 18.

They included objections to the denial to the right of a trial by jury on the issue of the existence of discrimination, objections to the utilization of the contempt power to enforce the making of contracts between unwilling parties, and the providing of free counsel to one of the parties to a dispute relating to discrimination without regard to the financial resources of the particular parties involved.[23]

The objections to the Rumford Act went beyond that, however. Many Californians seriously objected to the manner in which the Act had been passed in the first place.[24] The measure was strongly opposed when

[23]Ballot Argument in favor of Proposition 14, App. 3-5.

[24]Much is made in several of the briefs in favor of Respondents of the fact that Section 26 is more sweeping a measure than would have been required had mere repeal of portions of the Unruh and Rumford Acts been intended. From this they conclude that Section 26 was intended to enshrine what they are pleased to call a "right to discriminate" in the California Constitution.

As is more fully disclosed in the text following this footnote, the circumstances surrounding the enactment of the Rumford Act were unusual indeed. The measure was passed at the very end of the legislative session, under extreme pressure from lobbying (or more accurately "lying-in") demonstrators, and with the assistance of intense parliamentary maneuvering. Given that background combined with the fact, demonstrated in the general election of 1964, that the regulation embodied in the Rumford Act was imposed contrary to the wishes of the overwhelming majority of the people of the State of California, it is not unreasonable to suppose that the people felt that circumstances warranted something more than simple repeal.

In a somewhat different context, Justice Charles D. Breitel observed while delivering the Twenty-Second Annual Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York:

> "No one would be so foolish as to expect a court, because a statute is in derogation of the common law, to apply to it the canon of strict construction if it had been publicly debated before enactment, vigorously proposed by an executive, pushed through a reluctant legislature by a dramatic appeal of the executive over their heads to their constituents, and bearing all the marks of having been forged in

it was before the Legislature, and most observers doubted that it would reach the Senate floor before compulsory adjournment of the Legislative Session on June 21, 1963.[25] Extreme pressure was brought on the Senate, however. Headlines reported a lie-in demonstration by the Congress on Racial Equality during the last week of the session to demand passage of the Bill.[26] The

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fire and under the hammer on the anvil. On the other hand, such a statute does not have its equal in a legislative bill passed in the closing rush days of a legislature without public hearing or committee report, on a fast roll-call while the legislative chambers may lack a quorum but for the courtesy rule that only a maverick would disturb the proceedings and protract the session unduly, and the bill is signed into law by the executive only on the very eve of the expiration of his alloted time to approve or disapprove legislation."

Breitel, "The Lawmakers", 65 Colum. L. Rev. 749, 768-769 (1965).

A most important point, however, is that Section 26 must be judged by its effects and those effects are simply the repeal of conflicting portions of pre-existing legislation and the reservation of the power of further action in a narrow field of activity to the people of the State acting through the initiative process. In the absence of a self-executing mandate emanating from Section 1 of the Fourteenth Amendment that the State must take affirmative action to eliminate racial discrimination in purely private affairs, neither of these effects of Section 26 invades any constitutional right of Respondents.

[25]Comment, 19 Stan. L. Rev. 232, 237 (1966).

[26]Comment, 19 Stan. L. Rev. 232, 237. See, *e.g.*, "Sit-ins at Sacramento Re-enforced from L.A., 15 CORE Representatives Reach Capitol to Demonstrate for Fair Housing Bill", Los Angeles Times, June 2, 1963, §A, p. A [the article reporting: "The demonstrators . . . replaced others who have been sitting in 6-hour shifts around the clock since Wednesday."]; "Sit-in Group Continuing 'Fair Housing' Protest", Los Angeles Times, June 3, 1963, § 1, p. 23 [reporting: "Baby bottles, books and buttons spread around the second floor indicated the continued presence Sunday of one of the most unusual set of lobbyists ever seen in the old Capitol. * * * They say they will stay put until the Legislature takes final action on what proponents call a 'fair housing' bill."]; "Sit-ins Fill Capitol Foyer with Litter", Los Angeles Times, June 14, 1963, §1, p. 14 [reporting: "Civil rights demonstrations in the State Capitol ro-

(This footnote is continued on the next page)

demonstrators, lying shoulder to shoulder in rows across the main doorway to the Senate, declared they would stay put until the Legislature took final action on the Bill.[27] Various civic groups and civil rights organizations brought pressure to bear to force release of the Bill from Committee.[28] At 10:00 P.M. on June 21, 1963, 2 hours before compulsory adjournment, a motion was made for a special order of business to consider the Rumford Act at 11:00 P.M.; the Speaker of the Assembly threatened to adjourn the Assembly, with many Senate Bills left unconsidered, unless the Act was voted on; at 11:00 P.M., the Act passed the Senate with amendments, receiving one vote more than the necessary majority, and was returned to the Assembly for approval of the Senate amendments; at 11:59 P.M., despite hard feelings by many Senators over the parliamentary maneuvering, the Bill was finally passed.[29]

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tunda have left the flag-draped area looking more like a camp ground than a legislative hallway. The Congress of Racial Equality—CORE—has staged a round-the-clock sit-in for 15 days . . . * * * Sleeping bags, air mattresses, blankets, books and magazines, chessboards and guitars and even baby bottle warmers are piled around the carved, polished wood railing on the Capitol's second floor."]; "Protestors Lie Across Door to State Senate, 25 CORE Members Form Human Blockade to Demand Passage of Fair Housing Bill", Los Angeles Times, June 15, 1963, § 1, p. 7 [reporting: "Twenty-five members of a group demanding passage of a fair housing bill dropped flat at the entrance of the Senate chamber Friday and stayed there motionless until carried bodily into the outside corridor by state police. The human blockade was formed seconds after the Senate adjourned for the day. * * * The demonstrators remained inert as police carried them one by one to the floor outside. * * * Stretched like lengths of cordwood all across the corridor, the demonstrators continued their 'lie-in' for several hours after their removal. Mrs. Mari Goldman, . . ., CORE spokesman, had said the participants would stay in the hall for at least several hours 'and maybe indefinitely.'"]

[27] *Ibid.*

[28] Comment, 19 Stan. L. Rev. 232, 237 (Nov. 1966).

[29] *Ibid.*

Section 26 resulted from popular dissatisfaction with this kind of legislative conduct, reflecting as it did great political pressure and disregard for the ordinary process of deliberation after public committee hearings, and it was the effective repeal of what the public viewed as an ill-considered, hastily drawn, midnight measure that was one of the primary purposes of Section 26. Another purpose, just as primary, was to make it clear that the legislature could not without a vote of the people impose governmental sanctions, civil or criminal, on any owner of private residential property for his choice of buyers or tenants, whatever his reasons were.

If California, with its pervasive policy against racial discrimination, cannot by dint of the Federal Constitution modify or repeal any part of its body of anti-discrimination legislation, the results are far-reaching indeed. A decision that it cannot do so with respect to portions of the Rumford and Unruh Acts cannot be justified on the grounds that the repeal is the act of a racially discriminatory body politic or a reflection of a public policy of encouraging racial discrimination. The facts, both those in the record before this Court and those produced by the excursions beyond the record, demonstrate that among the states of the union California is in the vanguard of the battle against racial discrimination. If repeal of portions of the Rumford and Unruh Act by California were unconstitutional, it could only be because repeal of any portion of any state's civil rights legislation is forbidden *per se* by Section 1 of the Fourteenth Amendment. Few greater deterents to progressive experimentation in the field of civil rights could be imagined than such a doctrine of

one-way constitutionality.[30] Few doctrines could have a more demoralizing, debilitating effect on the people, or on legislative institutions. Few doctrines could more effectively deflect responsibility from those upon whom in a democratic society ultimate responsibility must reside—the people.

Realization of these consequences is not apparent in the opinions of the Court below. With deference, it needs to be said regarding the "pernicious constitutional doctrine"[31] of the Court below:

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[30]As we asked in our petition for certiorari, must states considering discretionary civil rights legislation henceforth reckon with the prospect that such legislation, once enacted, is somehow constitutionally immune to qualification or repeal in whole or in part? Must legislators in the 41 states having no fair housing statutes refuse to vote for such already controversial legislation out of the fear that it can never be repealed or modified? Must our highly successful legislative system of trial and error in our several states be abandoned? Must citizens throughout the nation abandon recourse to legislatures, courts and even the ballot box in seeking modification or repeal of unwanted regulation in wholly private areas of conduct? Does the Fourteenth Amendment to the Federal Constitution grant more extensive rights to Negroes and impose more severe obligations on property owners in California than in other states? Can the temporary incumbents of a local legislature vary the substance of Fourteenth Amendment rights?

[31]Analyzing the impact of the decisions of the court below, Professor Jerre S. Williams declared:

> "Suppose that a state did forbid by statute the creation of trust funds by testamentary disposition for the benefit of particular racial or ethnic groups. Then suppose after a few years it was decided that the state should return to the earlier principles. Under the reasoning of *Mulkey v. Reitman*, the state could not so return, for in the process of legislating to authorize this discrimination the state would engage in 'governmental action' and the Constitution would be violated. This is the core of the logical difficulty with the court's opinion. This is the doctrine of 'one-way legislation' about which concern was expressed earlier: a state may withdraw previously existing individual freedom to discriminate, but once that freedom has been withdrawn then

"Most of us must admire the vast humane improvements in the administration of the criminal law and the implementation of civil rights. These have had their inception insofar as official action is concerned largely in the judicial branch. . . . The time has long passed since reasonable men could argue about the rightness of the rise of a strong national government, but the time has not yet come when the dissolution of the federal-state system under a strong national goverment may be viewed with equanimity. The presence of backwardness, even barbarism, in some of the states, and perhaps inadequacies in all of the states, does not merit a judicial dissolution of the federal-state system. A central government perforce has its inadequacies and limitations. Such a dissolution is a political judgment of the first importance. The courts are not the intended, desirable, or efficacious organs for making or expressing that political judgment. They are not inherently the organs of democratic expression. After all, . . . it was the House of Commons, a representative legislative body, which sustained the structure of democracy for England."[32]

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the state may not return to the earlier law. This can only be said to be a pernicious constitutional doctrine taking away from the state or federal government the right to engage in legislative policy making in an area where there is no constitutional restriction on the state's common law policy."

Williams, "*Mulkey v. Reitman* and State Action" 14 U.C.L.A. L. Rev. 26, 30-31 (1966).

[32]Breitel, "The Lawmakers", 65 Colum. L. Rev. 749, 775-776 (1965).

VI.

SEVERABILITY.

Whatever real or imagined constitutional shortcomings Section 26 may have in its other applications or effects, it should at least be held to be a valid and effective repeal of the inconsistent portions of the Unruh and Rumford acts.[33] As previously stated, it is incontrovertible and undenied that a primary purpose of the proponents of Section 26 was the repeal of then-existing inconsistent legislation which restricted the freedom of private residential property owners in selecting the persons with whom they would deal and which embodied procedures which many found offensive. Given the express severability clause in Section 26,[34] given the express indication of intent to repeal in the official Ballot Argument,[35] and given the common knowledge among the electorate that Section 26 was intended to repeal inconsistent legislation, there can be no doubt that those who voted for Section 26 intended it to be effective at least as a *pro tanto* repeal of the Unruh and Rumford Acts. There is not a scintilla of evidence suggesting that those who enacted it would have preferred that it fall entirely if it were held unconstitutional because of its reservation to the people of power over future action or because of its possible application in cases not presently before the Court. If necessary to give effect to this intent, the repeal aspects of Section 26 should be sev-

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[33]Time has not permitted a systematic response to each of the many respects in which our opponents contend that Section 26 may possibly be unconstitutional. As we demonstrate throughout this Reply Brief, however, Section 26 is *in all respects material to the cases presently before this Court* a valid constitutional enactment of the people of the State of California.

[34]App. 1-2.

[35]App. 3-4.

ered from any aspects which might be deemed unconstitutional.[36]

The *amicus* brief filed herein for the United States argues, at pages 41-47, that Section 26 would be unconstitutional if applied in certain circumstances not present in the cases now before the Court and that it should for that reason be held unconstitutional here. As that brief acknowledges,[37] the leading authority on the related questions of severability and standing is *United States v. Raines,* 362 U. S. 17. In that case, it was declared at page 21:

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' [Citations omitted] Kindred to these rules

[36]Apart from its effect as a repealer, Section 26 does no more than reserve to the people of the State of California the power to enact future restrictions on the exercise of discretion by the owner of private residential property in the selection of the persons to whom he will or will not sell, lease, or rent his own property. If we are correct that such reservation of power is not justiciable, or if justiciable is clearly constitutional, there is no necessity to consider further the subject of severability. In the event this Court finds the reservation of power invalid, however, we here submit that it should nevertheless hold Section 26 to have been effective as a repeal of the conflicting portions of the Unruh and Rumford Acts.

[37]Pp. 42-43.

is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. [Citations omitted]"

Under those rules, Respondents and *amici* would have no standing to raise and this Court could not properly consider whether Section 26 might be unconstitutional if it applied to circumstances in which the government was "involved" in the constitutional sense in a transaction relating to residential property.[38]

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[38]Some of our opponents have urged that the state is necessarily involved in the discrimination which occurred in the cases before this Court by virtue of the fact that the alleged creation of a "right" of the owner of residential property to select the persons with whom he will deal with respect to that property constituted state action and involved the state in subsequent acts of discrimination. With reference to this contention, it should first be noted that Section 26 did not create any "right" for the property owner. Section 26 merely refers to a right which this Court has long recognized.

In *Buchanan v. Warley*, 245 U.S. 60, the plaintiff, a Caucasian, was asserting a right to *dispose* of his own property to a Negro who had contracted to buy it from him. The Negro had successfully defended an action for a specific performance by invoking a municipal ordinance which purported to prohibit the sale of specific property to a Negro. This court reversed, declaring:

> "The right of the plaintiff in error *to sell* his property was directly involved . . ." (Emphasis added; 245 U.S. 73).
>
> * * *
>
> "Property is more than a mere thing which a person owns. It is elementary that it includes the right to acquire, *use and dispose* of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U.S. 366, 391, 42 L.ed. 780, 790, 18 Sup.Ct.Rep. 383. Property consists of the free *use, enjoyment, and disposal* of a person's acquisitions without control or diminution save by the law of the land. 1 Cooley's Bl. Com. 127." (Emphasis added; 245 U.S. at 74).
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> * * *

In *Raines*, the Court did declare certain exceptions to the ordinary rules governing the scope of review, exceptions under which this Court may consider extraneous circumstances in passing on the constitutionality of a state enactment. However, none of the exceptions relied upon by the United States is applicable here:

1. Section 26 has not been construed by the court below to be unseverable either with respect to its repeal

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"That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded." (245 U.S. at 75).

As Mr. Justice Black concluded after reviewing the line of cases from *Buchanan* through *Shelley* in *Bell v. Maryland*, 378 U.S. 226, at 331 (dissenting opinion):

"* * * . . . [T]he property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principle stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then as this Court emphasizes in Buchanan, he is entitled to rely on the guarantee of due process of law, that is, 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. * * *"

Thus Section 26 did not "create" any right. In the absence of legislation regulating the discretion of a property owner in selecting the persons with whom he will deal with respect to his own residential property, the owner has always had a right to exercise that discretion in any fashion he might choose. Nothing in Section 26 (1) requires racial discrimination, or (2) singles out racial discrimination as permissible while prohibiting other forms of arbtrary conduct, or (3) places a special burden on those who desire not to discriminate or grants a special benefit to those who do, or (4) confers or withholds legal rights based upon a racial classification. In no sense does it deny respondents the equal protection of the laws.

The fact that Section 26 is an amendment to the State Constitution is of course without significance here. Had it been enacted merely as an initiative act, as opposed to an initiative constitutional amendment, it would nevertheless have been subject to

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aspects or with respect to any attempt to apply it to transactions in which the government might be constitutionally involved. As previously shown, the court held Section 26 unconstitutional because of its repeal effects;[39] therefore it never reached the question of the severability of that feature of the enactment. Similarly, the court below held Section 26 unconstitutional as applied to all racial discrimination, unseverable only with respect to its possible effects on non-racial criteria of selection of the persons to whom a property owner might or might not sell, rent or lease his own property.[40] It did not consider or rule on the severability of the government involvement aspects of Section 26.

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modification or repeal only by subsequent vote of the people. California Constitution, Article IV, Section 1.

Nor is there any support for the implication that the very existence of Section 26 necessarily encourages racial discrimination. As noted in n. 10, *supra*, a survey of property listings throughout California in 1966 (more than a year after the enactment of Section 26) disclosed that only .6% of a total of 286,406 listings contained any racial restrictions.

There is no evidence whatever that the acts of discrimination involved in the cases before this court were in any respect affected by the enactment of Section 26. As previously noted, p. 23, *supra*, the discriminatory act in *Mulkey v. Reitman* occurred prior to the passage of Section 26 and therefore could not conceivably have been affected by its enactment. There is simply no evidence that the state is "involved" in the discrimination of the private property owners who are before this court.

[39] *Supra*, pp. 23-24 and nn. 4, 17-20.

[40] The scope of the severability ruling in the court below is apparent from the following statement of the court in *Mulkey v. Reitman*: "It is immediately apparent from the operative portion of the instant constitutional amendment that it is mechanically impossible to deferentiate between those portions or applications of the amendment which would preserve the right to discriminate on the basis of race, color or creed, as distinguished from a proper basis for discrimination." R. 30. As that and the portion of the opinion which follows makes plain, the court below considered severability only in the sense of distinguishing between discrimination on the grounds of race and discrimination on other grounds, and neither in the sense of distinguishing between

2. The second exception relied upon by the United States is based upon its assertion that this controversy "concerns rights which cannot be readily asserted by those whom the impermissible conduct affects directly" (p. 45). "We know of no case," says the Solicitor General, ". . . where suit has successfully been maintained against the state or its agencies to compel it to perform" the affirmative steps required by the Fourteenth Amendment (p. 45). The real vice of Section 26 is that state agencies will "sit idly by even where the Fourteenth Amendment commands them to act . . ." (pp. 45-46).

Those assertions are puzzling to say the least. No state agencies in California to our knowledge are sitting idly by, and none in that category is identified by the Solicitor General. The Attorney General of California, himself, has not been idle, even here. There is no reasonable possibility that any agency in California will ignore its Fourteenth Amendment responsibilities. Moreover, Section 26 was not intended to and does not protect or affect the conduct of the state or any of its instrumentalities.[41] It does not apply to urban redevelopment

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purely private discrimination (on whatever grounds) and the discrimination in which the state is "involved" nor in the sense of distinguishing between the repeal effect of Section 26 and any other effects that section might have.

[41] In *Redevelopment Agency of the City of Fresno v. Buckman*, 64 Cal. 2d 886, 50 Cal. Rptr. 912, decided concurrently with the cases now before this Court, the majority of the court below took no issue with the following analysis of Justice Thomas P. White, dissenting (at 64 Cal. 2d 889-890, 50 Cal. Rptr. 914):

> "The redevelopment and housing legislation in California establishes a redevelopment agency in each community as an administrative arm of the state. Indeed, the California Health and Safety Code, section 33005, defines the term 'State' to include any state agency or instrumentality.

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and other similar governmental programs. *Cf. Redevelopment Agency v. Buckman*, 64 Cal. 2d 886, 889, 890, 50 Cal. Rptr. 912, 913, 914 (dissenting opinion). Finally,

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Since property owned by a redevelopment agency is excluded from the coverage of section 26, the agency may clearly include a nondiscrimination covenant as a condition of the disposition of its own property. And a purchaser of project property, whether from the redevelopment agency or a subsequent purchaser of the same property, may purchase it or not, as he sees fit. However, if he does purchase he accepts the land subject to other conditions or restrictions running with the land. If these restrictions, including a nondiscrimination one, do not suit his tastes, he is under no obligation to purchase.

This is equally true with the owner of property in a redevelopment project who enters into an agreement as a participating owner, thereby avoiding the acquisition of his property by eminent domain. It seems clear to me that if one enters into an agreement to sell or to purchase property upon terms satisfactory to the buyer and seller, such an agreement is binding and enforceable. Therefore, if a person chooses to take property with a nondiscrimination covenant, the state is not interfering with any right he might have to refuse to sell in the absence of such a contract. A nondiscrimination covenant running with the land is legal and lawful, and is accepted the same as all other covenants by subsequent purchasers."

In accord was the opinion of the Los Angeles City Attorney, given to the city shortly after the passage of Section 26, that Section 26 did not affect the power of the community redevelopment agency to enforce non-discriminatory practices in urban renewal projects. Los Angeles Times, November 11, 1964, Part I, page 2. As there reported, the City Attorney was not aware of any federally imposed policy requirement that could not be met by virtue of Section 26.

The Ballot Argument in favor of Section 26 (Proposition 14) clearly disclaimed any intent to affect the conduct of the state or its instrumentalities.

"The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private parties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation." (App. 4-5).

any persons whose rights might be adversely affected by any wrongful failure of any state agency to take such affirmative steps as the Constitution might require where state and private actions are "intertwined" has ample access to redress, coercive as well as compensatory, through the courts. In the event of any wrongful failure of a state agency to act, *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 31 Cal. Rptr. 606 is evidence of the availability of relief in California, and the Solicitor General is surely aware of *Brown v. Board of Education* [42] and its progeny in this Court. By virtue of the Supremacy Clause, Section 26 obviously cannot affect in the slightest the duties or responsibilities of the state or its agencies under the Fourteenth Amendment or the obligation of the state courts to recognize and enforce those duties and obligations.

3. Section 26 contains no sanctions whatever. It in no way attempts to control or prevent or even discourage nondiscrimination. It does not deter the exercise of rights by any persons whatever. The rule of *Aptheker*,[43] *Thornhill*,[44] and similar cases, that governmental attempts to coerce, control or prevent conduct must not be couched in terms so broad as to deter the exercise of fundamental personal liberties is clearly not applicable to a measure which does not bring the power of government to bear on private conduct in any manner whatsoever.

The severability question not having been resolved by the court below so far as is here material, this Court

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[42] 347 U.S. 483.

[43] *Aptheker v. Secretary of State*, 378 U.S. 500.

[44] *Thornhill v. Alabama*, 310 U.S. 88.

is free to rule upon it.[45] The resolution of the question depends only upon (a) whether legal effect can be given to the severed feature and (b) whether the legislature (here the people) intended that the severed feature stand in the event the measure were in other respects invalid.[46] Here, legal effect can certainly be given to the repeal aspects of Section 26 quite independently of the balance of its features. Similarly, any possible application of Section 26 to transactions in which the government is involved is readily severable from its application to strictly private transactions. Indeed, the issue which this Court held severable in *United States v. Raines*, 362 U.S. 17, was the application of Section 131 of the Civil Rights Act of 1957 to the conduct of public officials where it was contended that the act might also apply to private persons and that so applied it would be unconstitutional.[47] That is precisely the

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[45]"In cases coming from the state courts, this court, in the absence of a controlling state decision, may, in passing upon the claim under the Federal law, decide, also, the question of severability." *Dorchy v. Kansas*, 264 U.S. 286, 291.

[46]*Dorchy v. Kansas*, 264 U.S. 286, 289-291. And see separate concurring opinion of Mr. Justice Frankfurter, joined by Mr. Justice Harlan in *United States v. Raines*, 362 U.S. 17, 28:

> "To deal with legislation so as to find unconstitutionality is to reverse the duty of courts to apply a statute so as to save it."

[47]The action was brought by the United States seeking, in part, an injunction against the continuation of discriminatory practices by Members of the Board of Registrars and certain Deputy Registrars of Terrell County, Georgia. The action was based upon Section 131(c) of the Civil Rights Act of 1957 which provided for the institution of such an action whenever there were reasonable grounds to believe "that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a)", such rights relating to the vote. The District Court dismissed the complaint on the grounds that subsection (c) was unconstitutional since its language might permit its application "to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color." There was

type of severance the United States here contends this Court cannot make.

For the reasons set forth in Part III hereof and in our previous brief, the reservation of power to the people which Section 26 effects in a narrow area of private conduct is not unconstitutional. Regardless of the decision on that point, however, Section 26 was obviously intended at least to repeal conflicting portions of the Unruh and Rumford Acts. Unless the state was under federal constitutional compulsion to take affirmative action to prevent racial discrimination in purely private transactions, a proposition which is untenable as we demonstrated in our opening brief,[48] California was under no constitutional duty to enact either of those statutes. What it voluntarily enacted in an attempt

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no question but that "the complaint in question involved only official action". 362 U.S. 17, 20. This Court reversed, declaring:

> "The District Court seems to us to have recognized that the complaint clearly charged a violation of the Fifteenth Amendment and of the statute, and that the statute, if applicable only to this class of cases, would unquestionably be valid legislation under that Amendment. We think that under the rules we have stated, that court should then have gone no further and should have upheld the Act as applied in the present action, and that its dismissal of the complaint was error."
>
> 362 U.S. 17, 26.

Similarly, Section 26 is clearly constitutional insofar as it affects only private action, and since only private action is involved in the cases before this Court, Section 26 should be upheld as applied in this action and the decision of the Court below should be reversed.

[48]Op. Br. for Pet. 28-37. See particularly *Williams v. Howard Johnson's Inc. of Washington* (4th Cir.), 323 F. 2d 102, 106, *cert. den.* 382 U.S. 814, *reh. den.* 382 U.S. 933, cited at p. 29, n. 33 of that brief where the Court of Appeals declared:

> "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of [*sic.*, was a ?] deprivation of the equal protection of the law would be totally to emasculate existing case law."

to promote the public peace and welfare in the field of private housing, it was certainly free to modify or repeal in its continuing search for the best solution with the least friction for all of the people.

VII.
CONCLUSION.

The problem of racial discrimination in housing has been in recent years, still is, and promises to continue to be a serious and complicated one. It involves a confrontation of people in an area of peculiarly intense emotional attachment. It involves the conflict between long-cherished rights of privacy and freedom of association and established and valued though admittedly not absolute rights to own, enjoy and dispose of property not devoted to any governmental or public use, and the important rights of individuals of all races and creeds to acquire property, to enjoy the equal protection of the laws, and to receive due process. These rights have all been recognized by this Court. They all find support in the Constitution of the United States. The choice among them is one not easily made. Moreover, it is a choice that may and almost certainly does differ from place to place within as well as among the several states and from time to time in any location. It is a problem peculiarly suited to legislative rather than judicial treatment.[49]

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[49] As Mr. Justice Brandeis declared, dissenting in *Truax v. Corrigan*, 257 U.S. 312, 357:

> "* * * Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly when the public conviction is both deep-seated and widespread, and has been reached after deliberation. [Citations omitted] What, at any par-

The problem is not one being ignored today. It is being vigorously debated in Congress. It is the subject of various legislative experiments in California and other states throughout the nation. Judicial intervention cannot be justified by legislative neglect in the light of these facts.

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ticular time, is the paramount public need, is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several states of our Union in which the common law and its conceptions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law."

In a separate dissenting opinion joined in by Justices Holmes, Brandeis, Pitney, and Clarke, it was observed:

"* * * That no person has a vested interest in any rule of law, entitling him to have it remain unaltered for his benefit, is a principle thoroughly settled by numerous decisions of this court, and having general application, not confined at all to the rights and liabilities existing between employers and employees, or between persons formerly occupying that relation. * * *"

"The use of the process of injunction to prevent disturbance of a going business by such a campaign as defendants here have conducted is, in the essential sense, a measure of police regulation. And just as the states have a broad discretion about establishing police regulations, so they have a discretion, equally broad, about modifying and relaxing them. * * *"

"* * * And, just as one state might establish such protection by statute, so another state may, by statute, disestablish the protection, even as states have differed in their judicial determination of the general law upon the subject. * * *"

Truax v. Corrigan, 257 U.S. 312, 348 (dissenting opinion).

Indeed, judicial intervention is likely to stultify legislative efforts to cope with the problems of discrimination in housing. Judicial assumption of the burden of administering social policy in so sensitive and complex a field would necessarily further undermine public faith in and reliance upon their legislatures while simultaneously aggravating the problem by eliminating the sense of urgency which presently attends legislative review of civil rights problems. Moreover, the policies declared and enforced by this Court, necessarily being constitutional rather than legislative in character, they necessarily will be less flexible, less precise, less adaptable and changeable as differing times and circumstances warrant. Democracy can be most effective only when the responsibility for formulating policy and effectuating that policy by the institution of practical programs is placed where it belongs—on the legislature and the people.[50]

Unfortunately, solutions are also sometimes being sought in the streets rather than in the legislative halls or polling booths, by demonstration and counter-demonstration rather than through the orderly appeal to the processes of government. It is to the available institutions of democratic government, whether to the initiative process or through representative government, that efforts to effect satisfactory solutions must be directed. It is to those processes of government that the

---

[50]More recently Justice Breitel declared:

> "It is folly and a contradiction of the teachings of history to believe, whatever the defects of the legislative institution, that democracy can be preserved without legislative primacy in a people-elected and a people-responsive delegate legislature."
>
> Breitel, "The Lawmakers", 65 Colum. L. Rev. 749, 763 (1965).

people of California duly resorted in enacting Section 26 as an expression of a policy of government neutrality for the time being in this field. If time proves that policy to be unwise, relief should be sought at the polls.[51]

Where, as here, reasonable men can differ as to the propriety of a policy adopted by the state,[52] and where, as here, the policy does not clearly offend any provision of the Constitution, it is essential that the people be left free to effectuate their will through the established procedures of government. If the physical confrontations of Watts and Cicero are to be avoided, it is essential that this Court permit and encourage effective resort to due legislative process, both direct and representative.

The judgments of the California Supreme Court should be reversed.

Respectfully submitted,

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[51]"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. * * * . . . [I]t is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those upon whom in a democratic society it ultimately rests—the people. * * * [The endorsement of the electorate] would be a vindication that the mandate of this Court could never give." (Frankfurter, J. concurring in *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553.)

[52]For proof of the existence of differences of opinion on the desirability or need for the kind of legislative sanctions reflected in the Unruh and the Rumford Acts, see Op. Br. for Pet., p. 34, n. 45.

MAR 3 1967

COURT, U.S.

IN THE

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October Term, 1966
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Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

Motion for Leave to File Brief as Amicus Curiae on Behalf of Respondents and Brief of Amicus Curiae.

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IN THE

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LINCOLN W. MULKEY, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

Motion for Leave to File Brief as Amicus Curiae on Behalf of Respondents.

The United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, Region 6, and Paul Schrade, its Regional Director, move hereby for leave of Court to file a brief as amicus curiae with respect to the above entitled matter, and in support of said motion present the following reasons.

Consent to file a brief as amicus curiae with respect to the above entitled matter has been granted by attorneys for respondents, but denied by attorneys for petitioners.

The UAW, Region 6, encompasses the eleven Western states, and represents 75,000 members living

and working in the State of California. In California, as elsewhere, the UAW has been hampered in its efforts to maximize employment opportunities for all its members, regardless of their race, color, religion, national origin or ancestry, by the existence of residential segregation which reflects the patterns of prejudice and the lack of a free and open housing market.

When North American Aviation, Inc., located a major space production facility in Orange County, California, Negro members were required to commute 70 to 90 miles daily from Los Angeles, or else forfeit this employment opportunity. When General Motors moved its Oakland plant to Freemont, California, Negro members were effectively denied jobs because they could not obtain housing in the new community.

When the Ford Motor Company located a new plant in Milpitas, California, Negro members were denied access to the housing accommodations necessary to acceptance of the jobs which were otherwise open to them. As a result, the UAW itself developed and financed a cooperative housing project which would enable Negro members to obtain housing in the vicinity of their employment.

These examples can be multiplied by the countless similar opportunities lost every day by qualified men and women locked in urban ghettos throughout the state. The only remedy which strikes at the roots of their frustration is the development of a free and open housing market, which operates without regard for considerations of race, religion, or country of origin. Leave is sought to file a brief amicus curiae with respect to the constitutionality of Article I, §26 of the California

Constitution because of the relationship between that question and the development of a free and open housing market in California.

The heart of the brief which the moving party seeks leave to file with this Court is an exploration and analysis of the purpose of the enactment of Article I, §26, based both upon its own language and its legal, social, and historical context. Included is reference to extensive source materials revealing the nature of the considerations which led to its proposal and eventual adoption.

It is the belief of the moving party that much of the above analysis and information will not be fully presented to this Court by the parties to this proceeding. This belief is based upon discussion with attorneys for plaintiffs and respondents, and upon the nature of the arguments made and approaches used by the parties in the courts of California. The moving party believes that knowledge of the background of Article I, §26, is so essential to an understanding of the constitutional issues before this court that any brief which might shed some additional light on this question should be taken into consideration in its deliberations.

The opinion of the Supreme Court of California was based, in large part, upon an attempt of that Court to find a "partnership" or significant relationship between the State of California and the private acts of discrimination perpetrated upon respondents by petitioners. The moving party advances the proposition in its brief that it is not necessary to find such a significant involvement by the State of California in these acts of discrimination in order to find that Article I, §26

is in violation of the Fourteenth Amendment to the United States Constitution. The moving party contends that the enactment of Article I, §26 was *per se* unlawful because its purpose and result was the perpetuation of residential segregation based upon race. On the same grounds heretofore advanced, it is believed that these questions will not be adequately presented by the parties.

WHEREFORE it is prayed that leave of Court be granted to the UAW to file a brief as amicus curiae with respect to the above entitled matter.

Respectfully submitted,

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Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, Region 6, and Paul Schrade, Its Regional Director as Amicus Curiae.

STATEMENT OF INTEREST.

The United Automobile, Aerospace, and Agricultural Implement Workers of America, representing 1,750,000 members throughout the United States and 75,000 living and working in California, is proud of its position in the vanguard of the struggle to insure equal treatment for every American, regardless of the color of his skin, where he goes to church, or the country of his birth.

The UAW has fought for equal employment opportunity with the firm conviction that the greatest nation on earth can provide jobs for everyone willing and able to work, and that increased buying power resulting from increased employment means increased prosperity for all. The UAW also recognizes its obligation to all of its members, regardless of race, color, or creed, to maximize their employment opportunities. But it has found, in California as elsewhere, that employment opportunities are restricted by factors beyond the control of labor and management alike. One of the most important of these is the widespread existence of residential segregation based upon the patterns of prejudice.

When North American Aviation, Inc. located a major space production facility in Orange County, Negro members were required to commute 70 to 90 miles daily from Los Angeles or forfeit this employment opportunity. When General Motors moved its Oakland plan to Freemont, California, Negro members were effectively denied jobs because they could not obtain housing in the new community.

When the Ford Motor Company located a new plant in Milpitas, California, Negro members were denied access to the housing accommodations necessary to acceptance of jobs which were otherwise open to them. As a result, the UAW itself developed and financed a cooperative housing project which would enable Negro members to obtain housing in the vicinity of their employment.

These dramatic examples must be multiplied by the countless thousands of opportunities lost daily to men

and women locked in urban ghettos throughout the state. The remedy lies not in union built housing or in changing plant location. The remedy lies in a free and open housing market, which operates without regard for considerations of race, religion, or country of origin. The UAW thus has a direct and vital stake in any attempt either to facilitate or inhibit the development of such a housing market. It is for this reason that this brief is filed on behalf of plaintiffs and respondents herein.

Statement of Facts.

Plaintiffs and respondents are a Negro couple who brought suit in the courts of California under the provisions of the Unruh Civil Rights Act, Cal. Civil Code §§51 and 52. This Act proscribes discrimination within the state on the basis of race by "business establishments of every kind whatsoever." Among the businesses covered is that of providing housing accommodations to the public, and the remedies available include the right to both damages and injunctive relief. *Burks v. Poppy Construction Co.,* 57 Cal. 2d 463 (1962).

The complaint filed by respondents alleged that they had been denied access to housing accommodations in an apartment complex owned and managed by defendants and petitioners solely because of their race. For purposes of determining the constitutional issues involved in these proceedings, the allegations of the complaint stand as admitted. *Mulkey v. Reitman,* 64 A.C. 557, 559-560 (1966).

It is undisputed that, at the time of filing, respondents' complaint stated a sufficient cause of action

under California law. But subsequent to filing, and prior to trial on the merits, Proposition 14 was enacted by a vote of the people of California, and became effective as Article I, § 26 of the California Constitution. Article I, § 26 reads in pertinent part as follows:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such persons as he, in his absolute discretion, chooses.

This is the initial sentence of Article I, § 26, and its major operative provision. Upon its enactment, petitioners moved for judgment on the pleadings. Their motion was granted by the trial court on the sole ground that "the passage of Proposition 14 has rendered Civil Code §§51 and 52 upon which this action is based null and void." See *Mulkey v. Reitman,* 64 A.C. 557, 560 (1966).

The trial court was clearly constrained to take this position, or else violate the newly enacted constitutional mandate from the people of California. To enforce the provisions of the Unruh Civil Rights Act would be to deny, limit or abridge the absolute discretion accorded by Article I, §26: something which the court—like every other agency of state government—was forbidden to do.

The enactment of Article I, §26 had placed a barrier between the plaintiffs and the legal right, for-

merly accorded them under state law, not to be discriminated against solely on the basis of their race. It became the shield with which the defendants deflected the legal consequences of their admittedly discriminatory conduct.

But for the enactment of Article I, §26, plaintiffs would have been entitled to—and received—affirmative relief under California law, up to and including access to the housing accommodations which they desired, and for which they were qualified in every respect except their race. But for the active intervention of this expression of popular will, utilizing the mechanisms of government and supported by the full panoply of state power, they would have been free to occupy the property they sought without restraint.

Through the subsequent action of the California Supreme Court, on appeal from the decision of the trial court, the barrier was removed. Article I, §26 of the California Constitution was itself held void as a denial of the right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. Thus the defense which had been advanced by petitioners was eliminated. As a result, respondents have been restored to the same position they had as plaintiffs prior to the enactment of Article I, §26. *Cf. Hill v. Miller,* 64 A.C. 819 (1966).

LEGAL ARGUMENT.

The analysis of the nature and effects of Article I, §26 has posed conceptual difficulties, from the very beginning, for those who seek to fit their attack upon its constitutionality within the traditional and established concepts of Fourteenth Amendment guarantees. The difficulties have been manifest in the written briefs, in oral argument, and in the opinion of the California Supreme Court itself. They arise from the peculiar nature of the enactment, and the particular context in which it has come before the Court. They are not the only difficult questions which this case presents for decision, but their resolution lies at the heart of any decision which is rendered. The circumstances giving rise to them may be summarized as follows:

1. The act of discrimination complained of by respondents was the act of private individuals with respect to their own property. Because they felt themselves aggrieved by this act, respondents sought the aid of the state in obtaining a remedy. Assistance was denied to them because the state had chosen not to provide a remedy for the type of conduct of which complaint was made. Taken in this context, the state's only act was to refuse to act. How can this refusal to act be found unlawful unless the state was under an affirmative obligation to provide a remedy for the conduct involved?

2. Article I, §26 itself has no coercive effects. It is a declaration of governmental neutrality in an area where government may legitimately choose not to act. It represents a return to the state of the law existing before legislation proscribing discrimination in

housing was passed. If it was not mandatory under the United States Constitution to adopt such legislation, then how can it be unlawful to repeal it?

These are not easy questions to answer—when taken out of the context in which Article I, §26 was enacted. When Article I, §26 is placed within its social, legal, and historic context, however, they readily assume different proportions, and the problems they raise become more semantic than real. This case has aspects which appear unique, an attribute which certainly has not been unique in cases involving the subleties of racial discrimination. It is the intent of this brief to demonstrate that, even if unique in form, they are not unique in substance. Once this has been established, Article I, §26 becomes but one more sophisticated mode, adapted to the particular circumstances of the time and place at which it was enacted, to the same proscribed ends.

I.

THE ENACTMENT OF ARTICLE I, SECTION 26 OF THE CALIFORNIA CONSTITUTION CONSTITUTED STATE ACTION.

Article I, §26 of the California Constitution was a constitutional amendment proposed by the initiative process. It appeared as Proposition 14 on the ballot for the California General Election held on November 3, 1964, and was enacted by a vote of the people at that election.

There can be no doubt that the enactment of Article I, §26 constituted state action. The authority to amend the Constitution was derived from the state. California Constitution, Art. IV, §1. The mechanism necessary to amend the Constitution was furnished by the

state and its political subdivisions. California Constitution, Art. IV, §1; Cal. Elections Code §§3501, 3506-7, 3530-3533, 3559-3574; Cal. Government Code §§12165, 12167. The result was a declaration of public policy made by the fundamental instrument of state government.

In proposing and adopting Article I, §26, the people of California acted as an agency of state government, exercising through their reserved powers a traditional governmental function.

> "When the electorate assumes to exercise the lawmaking function, then the electorate is as much a state agency as any of its elected officials. It is thus apparent that, while state action may take many forms, the test is not the novelty of the form but rather the ultimate result which is achieved through the aid of state processes." *Mulkey v. Reitman*, 64 A.C. 557, 570 (1966).

The only question remaining, therefore, is whether enactment of Article I, §26 represented state action of a type prohibited by the Fourteenth Amendment to the United States Constitution.

The prohibited state action may be found in different ways. The arguments presented to the Supreme Court of California, and the Court's own opinion demonstrate that different avenues may ultimately lead to the same destination. But whichever road is taken, it is necessary to distinguish between two basic approaches which may be adopted, because the approach adopted will determine the nature of the relief which is afforded.

The first approach might be summarized as follows: There was state action, which was the enactment of Article I, §26 of the California Constitution. There was a private act of discrimination, the denial of access to housing solely on the basis of race, which would have been unlawful if engaged in by the state. The final and most difficult step is to connect the two through demonstrating a significant involvement by the state, through enactment of Article I, §26, in the private act of discrimination.

The second approach, unlike the first, does not rely upon the existence of the private conduct in order to demonstrate the illegality of the state action. Rather, determination of the unconstitutionality of Article I, §26 is made independently of the specific facts of the instant case. This is not to say that decision is made without reference to case or controversy. It is the existence of Article I, §26 which, if valid, will prevent respondents from obtaining relief. A determination of its constitutionality is thus necessary to a determination of their legal rights. But this may still be accomplished without demonstrating specific relationship between the state enactment and the private conduct, as is attempted under the first approach.

Under the second approach state action is found, as under the first approach, in the enactment of Article I, §26. But the *unlawful* state action is also found in the enactment itself. Thus, if the purpose of the enactment was invidious discrimination, and the result of the enactment was invidious discrimination, then the enactment would be unlawful *per se,* without the necessity of

showing a relationship between the conduct of the state and the conduct of the defendants in the instant case.

If the first approach is adopted, then the private act becomes unlawful because of the existence of Article I, §26. The supposedly private conduct either becomes tainted by the public law or itself assumes a public character. The party aggrieved by the discriminatory conduct would then be entitled to judicial relief independent of statutory remedy or the specific provisions of state law because his right would arise directly under the Fourteenth Amendment.

If the second approach is adopted, then Article I, §26, would be held void as state action denying the equal protection of the laws, and respondents in the instant case would be left in the same position they would have been but for the enactment. They would be entitled to utilize only those remedies for denial of housing accommodations on the basis of race which are provided by state law.

The decision in the instant case rendered by the Supreme Court of California demonstrates a certain amount of overlap between the two approaches discussed above. The Court finds state action in the enactment of Article I, §26. The Court finds discrimination in the denial of housing to respondents on the basis of their race. It then attempts to demonstrate a "partnership" between the two. It discusses the proposition that state action or involvement may render theoretically private conduct unlawful. But it appears to find that it is the state action which has become tainted by the private conduct. The result is a finding that Article I, §26 is void, thus permitting respondents to

seek legal redress. But their right to redress remains contingent upon the remedies available under state law. *Hill v. Miller,* 84 A.C. 819 (1966).

It is the contention of amicus that the enactment of Article I, §26 of the California Constitution was discriminatory in both intent and effect, as the supreme Court of California decided. It is the belief of amicus that the adoption of the second approach elucidated above will offer the most straight-forward and satisfactory answer to the question of the constitutionality of Article I, §26. The remainder of this argument will therefore be devoted to a presentation supporting the relationship and relevance of that approach to this case.

II.

THE ENACTMENT OF ARTICLE I, SECTION 26 OF THE CALIFORNIA CONSTITUTION HAD AS ITS PURPOSE AND RESULT THE PERPETUATION OF RESIDENTIAL SEGREGATION BASED UPON RACE.

A. Enforcement of Constitutional Guarantees Against Racial Discrimination Requires Determination of the Purpose and Results of State Action Drawn, in Part, From an Examination of the Conditions Under Which It Was Taken.

The enforcement of Fourteenth and Fifteenth Amendment guarantees has frequently required the courts to balance state claims of an innocent or permissible exercise of its lawful authority against allegations of invidious racial discrimination. The resultant decisions clearly establish the weight which must be accorded both the purpose of state action and its consequences when such a challenge is made.

In *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), an ordinance of the City and County of San Francisco required the consent of the Board of Supervisors to maintain or contruct a wooden laundry. On its face, it was a lawful exercise of governmental authority to promote the public health and safety. Nowhere in the ordinance was there reference to race or ancestry. But its intent and effect was to permit an exercise of discretion by the Board which would prevent Chinese from running laundries.

Sei Fujii v. California, 38 Cal. 2d 718 (1952), involved a statute prohibiting the ownership of real property by aliens ineligible for citizenship. Once again, on its face, there appeared to be a permissible exercise of the state's police power. Nowhere in the statute was there mention of race or ancestry. But once again its intent and effect—in this case to keep Japanese out of farming—was clear. By its terms the law classified persons on the basis of eligibility to citizenship, but in fact it classified on the basis of race or nationality.

As the demands of the Fourteenth and Fifteenth Amendments became more insistent and their enforcement more vigorous, increasingly complex and ingenious methods were devised to thwart them. But the United States Constitution nullifies sophisticated as well as simple-minded modes of discrimination, and even where the methods used have been circuitous and complex, the effects have been direct and the intent blatantly obvious.

In *Guinn v. United States,* 238 U.S. 347 (1915), this Court struck down a literacy requirement for Oklahoma electors which was coupled with a "grandfather clause"

exempting those entitled to vote on January 1, 1865 (when no Negro could qualify) and their lineal descendants. Oklahoma responded by passing a new law, which provided that voters in the general elections of 1914 automatically remained qualified voters, while others had a twelve day period in which to register or forfeit their voting privileges. In *Lane v. Wilson,* 307 U.S. 268 (1939), this Court analyzed that legislation as follows:

> "The practical effect of the 1916 legislation was to accord to the members of the Negro race who had been discriminated against in the outlawed registration system of 1914 not more than 12 days within which to reassert constitutional rights which this court found in the Guinn case to have been improperly taken from them. We believe the opportunity thus given Negro voters to free themselves from the effects of discrimination to which they never should have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise." *Lane v. Wilson, supra,* at 276.

The enforcement of constitutional guarantees against racial discrimination thus requires the courts to look beyond the language of a statute or constitutional amendment. State action must be judged in its social, legal and historical context. "Only by sifting facts and weighing circumstances can the . . . involvement of the

State . . . be attributed its true significance." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

In *Anderson v. Martin,* 375 U.S. 399, 403 (1964), the court examined a statute in light of the "'private attitudes and pressures' towards Negroes at the time of the enactment." Similarly, in *NAACP v. Alabama,* 357 U.S. 449 (1958) and *Bates v. Little Rock,* 361 U.S. 516 (1960), the court relied upon a showing that private acts of retaliation would follow public disclosure of the Association's membership lists.

Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), affd., 336 U.S. 933 (1949), struck down a constitutional amendment submitted to popular vote which required that voters be able to understand and explain any article of the Constitution of the United States. The District Court acted after examining "the conditions existing at the time, and . . . the circumstances and history surrounding [the amendment's] origin and adoption . . ." *Davis v. Schnell, supra,* at 880. It took judicial notice of the history of the period immediately preceding the adoption of the amendment, examined campaign materials, and referred to statements made by the measure's proponents.

In a subsequent opinion, this Court analyzed its reasons for affirming as follows:

> *"The legislative setting of that provision* and the great discretion it vested in the registrar made clear that a literacy requirement was merely a de-

vice to make racial discrimination easy." [emphasis added] *Lassiter v. Northampton Election Board,* 360 U.S. 45, 53 (1959).[1]

It thus becomes clear that intent and effect may be determinative of the validity of state action and the applicability of Fourteenth Amendment restraints. " 'Acts generally lawful may become unlawful when done to accomplish an unlawful end.' " *Gomillion v. Lightfoot,* 384 U.S. 339, 347 (1960).

Thus in prohibiting the abandonment of public education by Prince Edward County, Virginia, this court declared:

> "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, *the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.*" [emphasis added] *Griffin v. School Board,* 377 U.S. 218, 231 (1964).

The courts will not shut their eyes to that which all others can see and understand, nor will a state be allowed to achieve by indirection that which it may not do directly. The sword of justice will pierce through the layers of subterfuge and circumvention to lay bare the core of tyranny.

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[1]See also, *Louisiana v. United States,* 380 U.S. 145 (1965); *United States v. Mississippi,* 380 U.S. 128 (1965).

B. Examination of the Circumstances Surrounding the Origin and Adoption of Article I, Section 26 of the California Constitution Reveal That Its Purpose and Result Was to Perpetuate Residential Segregation Based Upon Race.

This case once again presents to this Court the onerous but essential task of balancing the assertion of a lawful exercise of governmental authority against the allegation of invidious racial discrimination. Thus, once again, this Court must ascertain the fundamental purpose of state action and the results which it will have. To do so, it is once again necessary to look beyond the specific language of an enactment, and view it in its social, legal and historical context.

1. California's Cities Clearly Evidence a Widespread and Deeply Ingrained Custom of Residential Segregation Based Upon Race.

The first fact of relevance in evaluating the intent and effect of Article I, §26 of the California Constitution is the social fact of a widespread and deeply ingrained custom of residential segregation based upon race which exists throughout California. It requires no resort to law books or libraries to substantiate; only the common experience which comes through living in our state's communities or driving through its cities' streets.

Yet, if anything, the extent of this phenomenon is greater and its nature graver than ordinary experience reveals. Perhaps it is best illustrated by the factual reports of governmental bodies created to analyze it.

The Los Angeles County Commission on Human Relations reports that the City of Los Angeles is di-

vided into four districts by the City Planning Commission: (1) the central district, (2) the southern district, (3) the western district, and (4) the San Fernando Valley district. Of the 334,916 Negroes living in the City of Los Angeles, 313,866, or 93.7 per cent, lived in the central district at the time of the 1960 census.

The central district consists of 30 named communities. A total of 290,278, or 86.6 per cent of the Negroes living in this district lived in nine of those 30 communities, which comprise approximately one-third of the geographical area of the central district and considerably less than 10 per cent of the city's total area.

Outside of the central district, there were 21,050 Negroes living in the City of Los Angeles, an increase of 12,297 over the 1950 census figures. But 10,869 of this number merely joined the already segregated communities of San Pedro, Venice and Pacoima.[2]

In San Diego, the pattern is the same. Of the 34,435 Negroes who lived in that city in 1960, 82 per cent lived in 10 of the 123 census tracts, while 84 census tracts have less than nine Negroes and 32 tracts contained no Negroes at all. Governor's Advisory Commission on Housing Problems, *Report on Housing in California,* 38 (1963), hereinafter referred to as *"Report on Housing"*.

The same pattern is repeated in the Northern part of the state. One census tract in Alameda contained 69.5 per cent of the city's Negroes. Two census tracts

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[2]The above statistical information was derived from a paper entitled, "Population and Housing in Los Angeles County: A Study in the Growth of Residential Segregation," published by the Los Angeles County Commission on Human Relations in 1963.

in Berkeley contained 34.6 per cent of that city's Negro population and had a Negro population of 91.6 per cent. In San Francisco, 21.1 per cent of the city's Negro population lived in four census tracts with a Negro population of 68.6 per cent. *Report on Housing* at 39.

Even these figures are misleading because the lines of the census tracts do not follow the lines of the racial ghettos. As we know from common experience, within the census tracts the patterns of discrimination are even more clearly marked.

But it is outside the Negro ghettos of the central city, in the "white ghettos" of the suburbs, that the pattern of discrimination is most striking and most blatant.

> "The California Advisory Committee of the U.S. Commission on Civil Rights said it was 'almost impossible' for minorities to buy new homes in new subdivisions. In Northern California, fewer than 100 nonwhites have been able to buy houses in unsegregated tracts in a period during which 350,000 new homes were built." *Report on Housing* at 39.

Between 1950 and 1960 the population of the San Fernando Valley increased from 311,016 to 738,831. During this period, the number of Negroes in the San Fernando Valley increased from 2,593 to 9,790. But reflected in this figure is an increase of 7,450 Negroes in the already segregated community of Pacoima. Thus, the 1960 census showed a total of 911 Negroes living in the San Fernando Valley outside of the Pacoima ghetto: a *decrease* of 253 persons since 1950.[3]

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[3]Information derived from "Population and Housing in Los Angeles County", *supra.*

This residential segregation is largely the result of racial discrimination in the sale and rental of residential real property. The lower income of racial minorities is a factor conditioning their geographic concentration. "Housing bias, however, serves a concomitant role with lower income to intensify concentrations within well-defined census tracts in the central cities." *Report on Housing* at 38. No one in California requires evidence beyond his own personal experience to substantiate this fact. It is a fact of which the Supreme Court of California has taken judicial notice in *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 881 (1963).

2. Residential Segregation Based Upon Race Was Fostered and Promoted Through the Interrelated Actions of State Government and Individuals Subject to Government Regulation.

Once established, segregated housing patterns are difficult to break. Individual decision easily becomes a function of the environment created by others. Discrimination feeds upon itself, and the introduction of a minority race into a previously restricted community may be made the occasion for fear and alarm. Yet the original development of segregated housing patterns was far more than the simple result of individual decision. Segregated communities were fostered and developed through the policies and practices of state agencies and individuals subject to state regulation.[4]

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[4]For a further exposition of government involvement in the development of segregated housing, see Loren Miller, *Government's Responsibility for Residential Segregation*, RACE AND PROPERTY (Diablo Press 1964).

A major factor in determining housing patterns is the position taken by the real estate industry:

> "The real estate broker is a key man in the majority of housing transactions. He finds buyers for housing and housing for buyers and he has detailed knowledge (or access to it) of the location of homes of various styles and prices. His policies and practices are among the foremost influences that determine where the various racial or religious groups will live." *Report of the United States Commission on Civil Rights,* No. 4 (1961) pp. 122-123.

But the policies and practices of the real estate industry reveal a history of hostility and opposition to residential integration:

> "Property owners' prejudices are reflected, magnified, and sometimes even induced by real estate brokers, through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogenous' neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. . . ." *Report of the United States Commission on Civil Rights,* No. 4 (1961) p. 2.

The applicability of these conclusions to California is amply documented by the California Real Estate Magazine, "official publication" of the California Real Estate Association. A random sample of its pages through

the years clearly reveals the attitude of the Association towards the relevance of race in the housing market, as well as furnishing evidence of the activities of the local associations.

The July, 1927 issue reported that:

> "After a survey of questionnaires and accompanying letters sent President Harry B. Allen of the California Real Estate Association . . . it is apparent that the color question has not become a serious problem in the northern half of the state, but is being gravely considered in all large cities and many exclusive residential communities in the southern half of the state. Most of these cities have already had foresight enough to provide subdivision restrictions and community agreements of owners to maintain an 'All Caucasian' district where colored races cannot encroach on territory already settled or being settled by the white race." "Color Question in California Reveals Many Problems," by Serena B. Preusser, Private Secretary to President Harry B. Allen. *California Real Estate Magazine,* July, 1927, p. 35.

The article then goes on to summarize some of the responses received to the questionnaires:

> "Pasadena has a large number of negroes [sic] who are recently trying to move into desirable sections of the city. Through subdivision restrictions and owners' agreements it is attempting to hold them in check . . .
>
> "The Los Angeles Realty Board recommends that Realtors should not sell property to other than Caucasians in territories occupied by them. Deed

and Government Restrictions probably are the only way that the matter can be controlled; and Realty Boards should be interested. This is the general opinion of all Boards in the state. . . .

"Stockton suggests that if the real estate operator uses common sense and good judgment untainted by extreme selfishness or avarice, he will offer no property in neighborhoods inhabited by the races in question and save himself trouble and worry by restricting the grant, and thus preventing the invasion of a district by other than the white race. . . .

"The only people of foreign races in Beverly Hills are servants. Glendale, too, prides itself on being an 'All American' city. . . .

"Mexicans do not wish to force themselves into better districts and when improvements are made they usually leave for a poorer district. They do not try to force themselves where they are not wanted; but negroes [sic], it is held, seem anxious to get into a white district to command a big price to leave." *California Real Estate Magazine,* July, 1927, pp. 35, 61.

In June, 1939, the magazine reprinted the Code of Ethics of the California Real Estate Association and the National Association of Real Estate Boards, including Article 34, which provides:

"A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality or any individuals whose presence will

clearly be detrimental to property values in that neighborhood." *California Real Estate Magazine,* June, 1939, p. 142.

The following year, the Southwest Branch of the Los Angeles Realty Board was presented the Achievement Award for 1940. Included in its Achievement Report was the following description of its activities:

> "Race Restrictions: Our very energetic Race Restrictions Committee is doing a wonderful piece of work in the community, assisted by a few volunteer property owners. In one large tract, petitions for imposing race restrictions have been circulated and notarized and over 90% of the property owners have signed them . . ." "Southwest Branch Winning Achievement Report," *California Real Estate Magzine,* December, 1940.

A similar report was made by the Glendale Real Estate Board in its award winning Achievement Report for for 1942. "Glendale Winning C.R.E.A. Achievement Report," *California Real Estate Magazine,* March, 1942, p. 18.

When this Court held that racially restrictive covenants were unenforceable in *Shelley v. Kraemer,* 334 U.S. 1 (1948), the Los Angeles Realty Board responded by launching ". . . a nationwide campaign to amend the United States Constitution to guarantee enforcement of property restrictions . . ." "Enforcement of Race Restrictions Through Constitutional Amendment Advocated." *California Real Estate Magazine,* September, 1948, p. 4.

The reasons for this campaign were explained as follows:

> ". . . millions of home owners of the Caucasian race have constructed or acquired homes in areas restricted against occupancy by Negroes. The practice of surrounding homes in such areas with the security of such restrictions has become a traditional element of value in home ownership throughout this nation. . . .
>
> ". . . The threat of occupancy by Negroes of property in such areas depreciates the value of all home properties and constitutes a direct deterrent to investment in the construction or acquisition of homes of superior quality whether large or small. . . .
>
> ". . . The insistance of some Negroes upon moving into areas previously restricted exclusively to the occupancy of Caucasians will necessarily create racial tensions and antagonisms and do much harm to our nation's social structure." *California Real Estate Magazine,* September, 1948, p. 4.

The key position which the real estate industry occupies in the housing market should not require further elaboration. It is self-evident. The same is true of the builders and developers who control hundreds and thousands of homes in new developments in those very suburban communities where the results of housing discrimination are most obvious.

Both of these industries have been subjected to extensive regulation by the state in the interest of the public health and safety. See *Cal. Business and Professions Code,* §§10000-10249.2 and 11000-11709.

Such regulation dates back to 1917. See *Stats.* 1917, Ch. 758, p. 1579. Yet until 1962, when the Unruh Act was applied in *Burks v. Poppy Construction Co.,* 57 Cal. 2d 463 (1962), to builders and developers and in *Vargas v. Hampson,* 57 Cal. 2d 479 (1962), to real estate brokers, they remained free to foster and promote the development of the very segregated communities held by those cases to be detrimental to the public welfare. Until that time, the State of California ignored these activities. Yet it continued to regulate and restrict other activities, by the same individuals, of far less importance to the community.

In addition, the state acted to place its own power and prestige behind these discriminatory practices. In 1919, the Supreme Court of California approved judicial enforcement of restrictive covenants. *Los Angeles Investment Company v. Gary,* 181 Cal. 680 (1919). The courts of California continued to enforce these agreements until 1949, when the Supreme Court of the United States held such action in violation of the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1 (1948).

The most important result of the state's action during the intervening years was not the bringing of lawsuits to enforce restrictive covenants, but the extent to which such lawsuits became unnecessary because individuals shaped their conduct to fit what they believed the law to be. Here, as elsewhere, the impact of our system of law is found not so much in its enforcement as in its educative and deterrent effect, which acts to change conduct so that legal sanctions need not be applied.

3. The National Public Policy Against Racial Discrimination, and the Detrimental Effects of Residential Segregation Based Upon Race, Ultimately Led to the Adoption of a Public Policy Against Discrimination in the Housing Market.

After *Shelley v. Kraemer, supra,* had made the national public policy clear, California's courts reversed their previous policy to prohibit any state involvement in the development or maintenance of segregated housing. The decision in *Barrows v. Jackson,* 112 Cal. App. 2d 464 (1952), anticipated the decision of the Supreme Court of the United States that damages could not be awarded for violation of a restrictive covenant. *Barrows v. Jackson,* 346 U.S. 249 (1953). That same year, the San Francisco Housing Authority was compelled to terminate its policy of allowing neighborhood housing patterns to determine eligibility for admission to publicly financed housing. *Banks v. Housing Authority,* 120 Cal. App. 2d 1 (1953). In *Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242 (1962), it was held that a court acting upon an unlawful detainer action could not refuse to consider a claim of racial discrimination as a defense to that action.

The Supreme Court of California recognized and emphasized the detrimental effects of residential segregation:

> "Discrimination in housing leads to lack of adequate housing for minority groups [citation omitted], and inadequate housing conditions contribute to disease, crime, and immorality." *Burks v. Poppy Construction Co.,* 57 Cal. 2d 463, 471 (1962).
>
> "Residential segregation is in itself an evil which tends to frustrate the youth in the area and to

cause antisocial attitudes and behavior." *Jackson v. Pasadena City School District,* 59 Cal. 2d 876, 881 (1963).

In 1959, the California Legislature responded to the detrimental effects of residential segregation with an affirmative program designed to promote the public health and safety. The Hawkins Act, *Stats.* 1959, Ch. 1681, p. 4074, proscribed discrimination by the owners of publicly assisted housing, while the Unruh Act, *Civil Code* §§51-52, prohibited discrimination "in business establishments of every kind whatsoever", including those in the business of furnishing housing accommodations. *Burks v. Poppy Construction Co., supra.*

But many felt that these laws were still not sufficient to make an impact on California's widespread and deeply ingrained custom of racial discrimination in the housing market, with the resultant well-established patterns of residential segregation. Under these laws,

> ". . . a citizen who is prevented from buying a house because of discrimination must have an attorney and go to court. And the unfortunate truth is that those who most frequently need to take such action are those who can least afford it." *Statement of Governor Edmund G. Brown on Human Rights,* transmitted to the California Legislature on February 14, 1963. See also Kaplan "Discrimination in California Housing: the Need for New Legislation," 50 Calif. L. Rev. 635 (Oct., 1962).

Thus, in 1963, the California Legislature passed the Rumford Act, Health and Safety Code §§35700-35744, empowering the Fair Employment Practice Commission to accept complaints of discrimination in housing.

Taken together, California's laws against discrimination in housing provided a means for enforcing the public policy of state and nation, as well as protecting public health and safety from the evils flowing from the perpetuation of residential segregation. The only property interest they affected was the use of property to injure another through denying him the right to acquire it *solely* because of his race, color, religion, national origin or ancestry. The only sanctions provided were for committing the specific act declared unlawful: discrimination based solely on those grounds.

Yet the campaign for an initiative constitutional amendment to add §26 to Article I, the Declaration of Rights of the California Constitution, was well under way within a year after passage of the Rumford Act by the state legislature. Petitions were circulating within months after the Rumford Act became effective, and the amendment was placed on the ballot at the next general election.

4. Article I, Section 26 of the California Constitution Was a Direct Response to the Very Concept of Governmental Concern With Discrimination in the Housing Market Because It Threatened the Perpetuation of Segregated Housing.

This, then, is the social, legal, and historic context in which Article I, §26 was proposed and passed, and in which it must be judged. That task can now be completed by turning directly to its own language and to the assertions of its proponents, revealed through the campaign materials which they circulated. They must be examined together for neither, standing alone, fully reveals the truth.

The major operative provision of Article I, §26 is contained in its initial sentence:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The approach adopted by the authors of Article I, §26 and proponents of Proposition 14 was a circuitous one, and at least arguably, somewhat misleading. On its face, Proposition 14 assumed the character of a protection of existing right, applicable equally to all and possibly covering a number of different situations. Nowhere did it mention race. Nowhere did it refer to discrimination. Nowhere did it even denominate specific statutes or judicial decisions which it would effect. This approach accorded with a general technique which had already been adopted elsewhere. *Cf., e.g.,* Property Owners Bill of Rights, found in the appendix, Exhibit B and Detroit Homeowners Ordinance, set forth in *Turner v. Leadbetter,* 9 Race Rel. L. Rep. 322, 324.

By contrast, the intended consequences of the passage of Proposition 14 were simple and direct. Public debates, newspaper articles, and campaign materials make clear what had been common knowledge in the community and freely admitted since the day petitions began to circulate: Proposition 14 was concerned exclusively with state policies which bore on discrimination in the housing market.

This is easily demonstrated by reference to the major campaign materials circulated by the proponents of

Proposition 14, appended hereto as Exhibit B. Nowhere in these documents is there to be found mention of any law or legal problem not related to government concern with racial discrimination which would necessitate enactment of Article I, §26. It is also demonstrated by newspaper articles such as the Los Angeles Times editorial appended as Exhibit A. This, of course, corresponds to what one would expect from the circumstances under which Proposition 14 was passed.

But the campaign materials circulated by proponents of Proposition 14 tell only half the story. They, too, can be misleading if taken alone and at face value, for they focus attention almost exclusively on the Rumford Act and abuses which allegedly occurred under it. Thus it has been argued that enactment of Article I, §26 did no more than repeal California's Fair Housing Laws and put us right back where we were before they were passed. See, *i.e.*, "Realtors Hit U.S. Stand on Proposition 14", Los Angeles Times, Nov. 12, 1964, Part I, p. 10. *Cf., Mulkey v. Reitman,* 64 A.C. 557, 574 (dissenting opinion).

But the Rumford Act, standing alone, was clearly not the real target of Proposition 14, nor was Proposition 14 aimed at the reform of specific abuses or inequities in the administration of California's Fair Housing Laws. Once reference to extrinsic evidence has established the true area of concern of Article I, §26, the very language of that section belies the claims of its proponents as to its scope, and reveals beyond contravention its true purpose.

Article I, §26 is written in broad, sweeping terms. Its language is absolute and all-inclusive. It declares

a private right to discriminate which exists as an imperative absolute—without qualifications, without exceptions, and without limits. Article I, §26 acts to place this right beyond the reach of legislature, courts, executive and administrative agencies. It does not repeal existing legislation. Rather, its declaration of right is interposed between the private conduct it protects and the governmental authority to restrain it, preventing both present enforcement and future enactment. It also restrains the judiciary from exercising its authority to afford protection to self-executing constitutional guarantees and common law rights. (*Cf. Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242 [1962]).

This is the scope of Article I, §26, and its scope reveals its true intent. An infinite choice was open to the authors of Proposition 14 in dealing with the procedures used in administering California's laws protecting equal opportunity in the housing market. The range of choice was limited only by their imagination and ingenuity, and the extent of real or imagined grievances.

The use of administrative procedure could have been permanently proscribed. Jury trials could have been made mandatory. An award of damages could have been provided for—either against complainants or against the state—for expenses resulting from legal action, and compensation made available to a respondent or defendant for any economic hardship or personal inconvenience he might suffer. Of course, any or all of California's Fair Housing Laws could have been expressly repealed.

Every conceivable objection to California's laws could have been obviated without using the absolutist approach which was adopted except for the one that they might lead to integrated neighborhoods.

Thus Article I, §26 stands revealed as more than simply a reaction to the particulars of statutory procedure or judicial decision. It is a response to the very concept of governmental interest in the elimination of residential segregation through promotion of equal opportunity in the housing market. Its intent and effect is not only to nullify governmental action already taken, but to free completely those who discriminate on the basis of race, color, religion, national origin or ancestry in the sale or rental of housing accommodations from the threat of further or future restrictions. As the ballot argument in support of Proposition 14 proclaimed:

> "Your 'Yes' vote on this constitutional amendment will *guarantee* the right of all home and apartment owners to choose buyers and renters of their property as they wish, *without interference by State or local government.*" [emphasis added] *Proposed Amendments to Constitution,* General Election, 1964, p. 18.

It is true that, in theory, this language and the language of Article I, §26 might also be applied to situations not involving racial or religious discrimination. But neither the social, legal or historic context in which Proposition 14 arose, nor the circumstances surround-

ing its adoption provide any indication that such considerations were relevant. The Supreme Court of California found that,

> "Proposition 14 was enacted . . . with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right." *Mulkey v. Reitman*, 64 A.C. 557, 562-563 (1966).

This finding, amply supported by the evidence before it and by the common knowledge of the people of the State of California, should be accorded great weight in the deliberations of this Court.

Attempts have been made by those who seek to validate Article I, §26 to conjure up meaningful alternatives to that governmental power which it eliminated. The illusory and hypothetical schemes which result only demonstrate further the extent to which *effective* government power was removed. If residential segregation based upon race is a consequence of discrimination in the housing market, so long as such discrimination persists, segregation will continue.

Public housing programs, for example, might help alleviate some problems of inadequate housing. But they cannot affect segregation if they are islands of equality in an uncontrolled and uncontrollable sea of absolute individual discretion. To present such programs as solutions to discrimination in housing is like advocating more government jobs to solve the problems arising from discrimination in employment.

To speak, alternatively, of voluntary action is merely to rephrase the conclusion that this is an area of absolute individual discretion from which the police powers of the state have been removed. To posit a police power which must protect the public health and safety through moral suasion and good will alone, without recourse to regulation, is to posit a police power which does not exist.

Of course Article I, §26 can always be repealed in the same way in which it was enacted. But Article I, §26 was not passed in order to be repealed, and if it was discriminatory in intent, it will only be repealed when discrimination ceases.

It is much too late in the game to trot out such makeweights as actually bearing upon the intent and effect of Article I, §26. No alternative programs appeared on the ballot with Proposition 14, or in the ballot argument, or were otherwise proposed to the voters. Proposition 14 presented not a change in tactics, but a revision of the fundamental public policy of the state. This is admitted even in the dissenting opinion of Justice White of the California Supreme Court. See *Mulkey v. Reitman*, 64 A.C. 557, 586 (dissenting opinion). Any theoretical palliative now advanced must cope not only with its own inadequacies, but with the countervailing force exerted by the declaration of right promulgated by Article I, §26.

By proscribing *all* means of carrying out California's previously established public policy against racial discrimination by the owners of residential real property, Article I, §26 demonstrates that it is not concerned with means. Article I, §26 thus makes clear by its own

terms that it was not the *means,* but rather the *ends* of California's public policy against discrimination in housing that it was intended to affect. Whether the intent and effect of Article I, §26 was only to handicap state government in its efforts to achieve desegregation, or to render such efforts completely impossible, its legal significance in the same.

III.

ARTICLE I, SECTION 26 OF THE CALIFORNIA CONSTITUTION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE (1) IT REQUIRES ABDICATION OF GOVERNMENTAL RESPONSIBILITY SO AS TO PERMIT THE PERPETUATION OF RESIDENTIAL SEGREGATION BASED UPON RACE AND (2) IT AFFIRMATIVELY ACTS TO ENCOURAGE AND PROMOTE RACIAL DISCRIMINATION IN THE HOUSING MARKET.

Once Article I, §26 of the California Constitution has been examined in its social, legal, and historic context, and its purpose and result have been established, it becomes a much simpler task to determine whether it violates the Fourteenth Amendment to the United States Constitution.

Article I, §26 now fits easily within traditional and established theories which have evolved from cases dealing with racial discrimination. It thus becomes unnecessary to explore the difficult and as yet unanswered questions involving the scope of a state's affirmative obligations under the Fourteenth Amendment, and the means available for fulfilling those obligations.

Article I, §26 denies to persons in California the equal protection of the laws because (1) it requires abdication of governmental responsibility so as to permit the perpetuation of residential segregation based upon race and (2) it affirmatively acts to encourage and promote racial discrimination in the housing market.

A. Article I, Section 26 of the California Constitution Is Prohibited State Action in Violation of the Fourteenth Amendment to the United States Constitution Because It Abdicates Governmental Responsibility so as to Permit the Perpetuation of Residential Segregation Based Upon Race.

Article I, §26 masquerades as an extension of traditional protections afforded to property, complementing the guarantees of the federal Constitution. But the costume is ill-fitting one.

Article I, §26 does not complement, but rather conflicts with, the Fourteenth Amendment to the United States Constitution. It represents not an extension of existing guarantees, but the creation of a new right completely alien to our constitutional traditions: a private right to discriminate on the basis of race, color, religion, national origin, or ancestry which exists as an imperative absolute—without qualifications, without exceptions, and without limits—binding the state where national public policy and the health and safety of its citizens require that it remain free to act.

The concept of absolute individual discretion is alien not only to the traditions of American democracy, but to the very concept of organized society:

> ". . . neither property rights nor contract rights are absolute; for government cannot exist if the

> citizen may at will use his property to the detriment of his fellows or exercise his freedom of contract to work them harm." *Nebbia v. New York,* 291 U.S. 502, 523.

Even the absolute terms of the First Amendment do not afford such absolute protection to individual behavior. The guarantee of free speech does not protect utterances which are libelous or obscene. *Beauharnais v. Illinois,* 343 U.S. 250 (1952). Neither do guarantees of religious freedom protect all behavior springing from religious belief. *Reynolds v. United States,* 98 U.S. 145 (1878).

The constitutional protection of property, on the other hand, is not even expressed in absolute terms. See United States Constitution, Fifth Amendment, Fourteenth Amendment; California Constitution, Art. I, §13.

> "Property like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. . . . property, like every other social institution has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another." Cardozo, *The Nature of the Judicial Process,* pp. 87-88.

It is true that, under our law and legal traditions, a man's home may be his sanctuary. *Cf. Lombard v. Louisiana,* 373 U.S. 267, 343 (1963) (concurring opinion). But the attack here is on regulation of the house that is not a home, but a commodity which has been placed upon the open market. Is a man's interest in who buys his house superior to his interest in who buys other property which he offers up for sale, whom he

hires in his shop, or whom he serves in his restaurant? Do the sale of residential real property and the rental of housing accommodations so differ from all other businesses that they must be accorded a privilege enjoyed by no other business in California? What justification other than resistance to integrated neighborhoods offers itself for this exemption from the standards made applicable to all other business transactions by Civil Code §§ 51-52?

The proponents of Proposition 14 asserted that Article I, §26 was merely a declaration of governmental neutrality:

> "Your 'Yes' vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another." *Proposed Amendments to Constitution,* p. 18.

But this concept of government "neutrality" is a myth which will not stand the test of its own logic.

The enforced neutrality of government embodied in declarations of right exists for the purpose of permitting the exercise of that which is protected from interference. Thus the First Amendment to the United States Constitution, through preventing interference with the expression of ideas and religious belief, permits the free exercise of speech and religion. In the same way, Article I, §26 of the California Constitution acts to permit racial discrimination where it otherwise could not exist.

Where the purpose of a state's abdication of its traditional responsibility to regulate elections for public office is to permit racial discrimination by private associations which effectively hampers voting rights, such

conduct will violate the Fifteenth Amendment even though, arguably, no state action is involved. *Terry v. Adams,* 345 U.S. 461 (1953); *Baskin v. Brown,* 174 F. 2d 391 (4 Cir., 1949); *Rice v. Elmore,* 165 F. 2d 387 (4 Cir., 1947). No election machinery may be sustained if its purpose or effect is to deny Negroes on account of their race an effective voice in the governmental affairs of their county, state, or community. *Terry v. Adams* at 466.

Abdication of responsibility to educate with the purpose of permitting private associations to discriminate will be treated in the same way. *Griffin v. School Board,* 377 U.S. 218 (1964). Such an attempted abdication of governmental authority in order to permit racial discrimination by others theoretically outside the scope of the Fourteenth Amendment will not be allowed to thwart the Amendment's command.

Most recently, in *Evans v. Newton,* 382 U.S. 296 (1966), this Court struck down a city's attempt to free itself of responsibility for management of a public park so that the discrimination forbidden to it as a public agency could be carried on by private citizens. A striking parallel exists between the pattern of conduct which gave rise to the decision in that case, and the pattern of conduct which emerges here.

For years, the City of Macon had regulated and supervised the park and its activities, just as, for years, the State of California has regulated and supervised the sale and rental of real property. For years, the City of Macon had exercised its authority so as to foster and promote a policy of racial segregation. Similarly, for years, the State of California exercised its authority so as to foster and promote residential segrega-

tion based upon race. California lent the aid of its courts to those who coerced residential segregation through restrictive covenants, and permitted those whom it regulated in the interest of public health and safety to breed crime, disease and immorality through denying others access to housing solely on the basis of race.

Both the City of Macon and the State of California then reversed their prior policies, and in both cases the response was the same: an attempt to force government to relinquish its regulation of the facility or activity involved so as to permit the segregated patterns of the past to continue.

It may be argued that the cases referred to above are clearly distinguishable from the instant case because they involve traditional governmental functions. But such an argument ignores the scope of Article I, §26, which strikes not at particular incidents of the state's police power manifesting themselves in specific pieces of legislation, but at the very ability of the state to regulate at all.

> ". . . the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and . . . a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." *Truax v. Corrigan*, 257 U.S. 312 (1921).

Article I, §26 has stripped the State of California of its power to protect the public health and safety, and

the public morals, in an area of legitimate and significant governmental concern. It is this power itself, and not merely its exercise, which has been affected. The existence of power encompasses the discretion not to use it, as well as to determine the manner in which it shall be used. The exercise of that discretion is a matter of vital local concern. The existence of that discretion is also a matter of basic constitutional right.

What this Court said in another context, many years ago, remains equally pertinent today:

> "No legislature can bargain away the public morals. The people cannot do it, much less their servants. The supervision of . . . these subjects of governmental power is continuing in nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." *Stone v. Mississippi,* 101 U.S. 814, 819 (1880).

Article I, §26 represents an enforced abdication of governmental authority in an area of legitimate governmental concern. The determining factor in evaluating the state's action, and determining its consistency with Fourteenth Amendment guaranties, should not be the nature of the function which is abdicated, but rather the purpose of the abdication and the results which flow from it. If a state acts to divest itself of its power to govern, and does so with the intent and effect of achieving a deprivation of constitutional guarantees,

then the act of withdrawal itself must be found an unlawful exercise of the state's power.

The fact that the state acted in response to the desires of a majority of its citizens does not affect these conclusions. Fundamental right may not be infringed simply because a majority of the people choose to do so, and no plebiscite can legalize an unjust discrimination. *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713, 736-7 (1964). Our government—both state and federal—remains bound by those restrictions beneficently imposed by the Constitution of the United States. It must be so bound whether it acts in response to the popular will or a willful few. This is the fundamental principle of a constitutional system of government.

So long as government retains the power to govern, its failure to act, or to act in a particular manner, may find justification. It may represent a judgment as to the gravity of a problem, or the desirability of action at a particular historical moment. It may reflect a judgment as to the appropriateness of particular means to the desired ends. It thus may be considered a proper exercise of legislative discretion on political questions which should remain free from judicial interference. But when the very power to make judgments is abdicated, and that abdication occurs for the express purpose of preventing those judgments from being made, then the state has sufficiently involved itself in the private activity which results to be in violation of the Fourteenth Amendment.

B. Article I, Section 26 of the California Constitution Is Prohibited State Action in Violation of the Fourteenth Amendment to the United States Constitution Because It Affirmatively Acts to Encourage and Promote Racial Discrimination in the Housing Market.

A state cannot be held responsible under the Fourteenth Amendment for private acts of racial discrimination with which it has no connection. *Civil Rights Cases,* 109 U.S. 3 (1883). But neither may a state facilitate, encourage, or promote such discriminatory conduct. Thus, in *Barrows v. Jackson,* 346 U.S. 249, 254 (1952), the court refused to award damages in a civil suit against the violator of a private agreement because, "The result of that sanction by the state would be to encourage the use of restrictive covenants."

In *Lombard v. Louisiana,* 373 U.S. 267 (1962), the court found prohibited state action in public statements made by the mayor and superintendent of police of New Orleans. No state law or local ordinance required segregated facilities. Nowhere in their statements did the mayor or superintendent mention government support of segregated facilities. There were only declarations of intent to preserve order and protect the public health and safety. In context, however, the effect of these statements was to encourage the perpetuation of segregated facilities by private parties through making clear that acts of private discrimination would have the support of public authority.

A crucial factor is the interplay of governmental and private action in light of private attitudes and pressures existing in the community. In *Anderson v. Martin*, 375 U.S. 399 (1964) this Court struck down a requirement that the race of candidates appear with their names on the ballot because the effect of the requirement was to encourage private acts of discrimination. In that case no act of the state, standing alone, would violate constitutional rights. In light of the surrounding circumstances, however, there was a facilitation and encouragement of private acts of discrimination. It was this result which made the state action objectionable.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), a court order requiring the production of the local membership lists of the NAACP was held an unconstitutional interference with freedom of association. The court said (p. 463):

> "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures."

The Court looked to the circumstances surrounding an otherwise permissible act of state government to determine its intent and effect. Taken in the context of local custom and private attitude, the act stood revealed as an act of incitement to retaliation which violated the constitutional guarantees of the Fourteenth Amendment.

Taken in the context of local custom, private attitude, and community understanding, Article I, §26 of

the California Constitution encourages and facilitates private acts of discrimination. It thereby assumes those same characteristics which invalidated the theoretically neutral action of the state in the above cases.

Article I, §26 is more than a negative declaration singling out a particular area as inappropriate for governmental regulation. It was deliberately worded as an affirmative declaration of right: the "right" of absolute individual discretion in the sale or rental of residential real property.

This "absolute discretion" has been enshrined in Article I, the Declaration of Rights of the California Constitution, along with the rights to freedom of speech, religion, and the press; the right to trial by jury; the right to assemble and petition; and the right to due process. It is made inviolate: no arm of the state can interfere with it.

The full force of the Constitution of California is thereby placed behind the practice of racial and religious discrimination in the sale and rental of residential real property and the perpetuation of segregated housing, with its attendant problems of crime, disease, and immorality, *de facto* segregation in the public schools, limited job opportunities, and second-class citizenship. By proclaiming that legislation against such discrimination is a violation of fundamental right, the proposed constitutional amendment clearly implies that such conduct is indeed proper.

Such a constitutional amendment does not simply neutralize governmental efforts to cope with the problems of segregated housing. It serves to crystalize opposition to integrated neighborhoods, no matter how

achieved. When a right is declared, conduct in accordance with that right is encouraged. When interference with a custom is declared wrong, that custom is reinforced. This is especially true when the custom is as widespread and deeply ingrained as the custom of residential segregation based upon race.

Article I, §26 affects an area of human behavior where community attitudes and local pressures have great influence on individual behavior. Under such circumstances, enforced government abdication is far worse in its effect than governmental inaction. Such abdication can only signify that the battle between public interest and private prejudice has already been fought —and lost. Many who would otherwise obey the dictates of the law—or in the absence of the law the dictates of their conscience—will yield to the community expression of proper conduct in the disposition of residential real property. When that community expression is embodied in an amendment to the state Constitution, it becomes state action encouraging and facilitating private discrimination which is prohibited by the Constitution of the United States.

In the deceptiveness of its language, Article I, §26 is a sophisticated means of discrimination. In its purpose, intent, and effect it is as brutally unsophisticated as a slammed door. It is a disabling blow to the Constitution of California, and an overt declaration of hostility to the principles proclaimed by the Constitution of the United States. It cannot be permitted to stand.

SUMMARY OF ARGUMENT.

The enactment of Article I, §26 of the California Constitution clearly represented state action. The question for decision before this Court is whether it represented state action of a type prohibited by the Fourteenth Amendment to the United States Constitution.

In order to find that Article I, §26 violates the Fourteenth Amendment, it is not necessary to demonstrate a connection between it and the specific act of discrimination perpetrated against plaintiffs and respondents herein. Rather, it is possible to find that the enactment of Article I, §26 was *per se* unlawful. This can be done by demonstrating that the purpose and result of the enactment of Article I, §26 was the perpetuation of invidious racial discrimination.

If the purpose and result of Article I, §26 was the perpetuation of racial discrimination, then it is void as a violation of the guarantees of equal protection provided by the Fourteenth Amendment. If it is void, then it can no longer stand as a barrier between respondents and their right to the relief from private acts of discrimination provided under the laws of California. Respondents would then be entitled to relief from those private acts of discrimination, not because they were unlawful under the Fourteenth Amendment, but because Article I, §26 was unlawful under the Fourteenth Amendment, and therefore could not act to nullify the remedy for private acts of discrimination which the state had provided.

The social, legal, and historical context in which Article I, §26 was enacted clearly demonstrates that it had as its purpose and result the perpetuation of residential

segregation based upon race. California's cities clearly evidence a widespread and deeply ingrained custom of residential segregation based upon race. This custom of residential segregation has, in the past, been fostered and promoted through the policies and practices of state agencies and individuals subject to state regulation. While comprehensively regulating the business activities of real estate brokers and housing builders and developers, the state ignored the blatant and outspoken efforts of these industries to maintain segregated communities. In addition, the state acted to place its own power and prestige behind these discriminatory practices through the enforcement of racially restrictive covenants.

The national public policy against racial discrimination, and the detrimental effects of residential segregation upon the public welfare, health and safety, ultimately led to a reversal of California's prior practices. The result was the adoption of a public policy against discrimination in the housing market, affirmatively implemented through state legislation and judicial relief.

Article I, §26 was a direct response to the state's efforts to prohibit racial discrimination from occupying a place in the housing market, because the implementation of these efforts threatened the perpetuation of segregated housing. It was more than simply a reaction to the particulars of statutory procedure or judicial decision. It was a response to the very concept of government interest in the elimination of residential segregation. Its intent and effect was not only to nullify governmental action already taken, but to free completely those who discriminated on the basis of race from the threat of further or future restrictions.

Once examined within its social, legal, and historical context, the true intent and effect of Article I, §26 thus become clear. First, it acts to require abdication of governmental responsibility so as to permit the perpetuation of residential segregation based upon race. Such an enforced abdication of governmental authority, in an area of legitimate governmental concern, is a violation of the guarantees of the Fourteenth Amendment. If a state acts to divest itself of its power to govern, and does so with the intent and effect of achieving a deprivation of constitutional guarantees, then the very act of withdrawal becomes a prohibited state action, and is void.

The enactment of Article I, §26 also violated the Equal Protection Clause of the Fourteenth Amendment because it acted to encourage and promote racial discrimination in the sale and lease of real property. Article I, §26 is without the appearance of coercive force. But coercive force is not a necessary attribute of state action under the Fourteenth Amendment, if the state action serves to encourage private acts of racial discrimination.

This Court has looked to the interplay of governmental and private action in light of private attitudes and pressures existing in a community, as well as to the governmental act itself. Taken in the context of local custom, private attitude, and community understanding, Article I, §26 of the California Constitution encourages and facilitates private acts of racial discrimination. It is therefore void under the Fourteenth Amendment to the United States Constitution.

CONCLUSIONS.

For the foregoing reasons, the Supreme Court of the State of California was correct in its decision that enactment of Article I, §26 of the California Constitution was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that Article I, §26 was void in its general application. The decision of the Supreme Court of California should therefore be affirmed.

Respectfully submitted,

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EXHIBIT A.

TIMES EDITORIALS

Decision on Housing Initiative

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

That, in essence, is an initiative amendment to the State Constitution upon which Californians will be asked to vote Yes or No this year.

Petitions to place it on the ballot are now circulating throughout the state. It doubtless will go before the electorate in November.

Acts Would Be Nullified

Immediate effect of this proposed amendment, if ratified by a majority of the voters, would be to nullify portions of the Rumford Act (relating to discrimination in housing) and the Unruh Act (dealing with real estate brokers).

Under the Rumford Act, owners of "any publicly assisted housing accommodation," whether multiple or single dwelling, cannot refuse to sell or rent to any person solely because of his race, color, religion, national origin or ancestry. (This Rumford Act provision includes housing constructed under state or federal loans. Although the proposed amendment would repeal this provision as it applies to housing constructed under state loans, it cannot affect housing constructed under federal loans, so long as the existing Presidential directive remains in effect.)

Further, the Rumford Act applies to all dwellings "containing more than four units," meaning apartment houses, even if the owner acquired them without such public assistance. The proposed initiative amendment also would repeal this provision.

Aware that the public is divided almost evenly on the proposed amendment, according to recent polls, The Times has pondered the issue for weeks seeking an editorial judgment based on principle.

During an extensive series of editorials last June, when the issue burned hottest in Los Angeles, The Times urgently espoused the granting of all minority rights guaranteed under the U.S. Constitution, and specifically urged the implementation of equality in education and employment.

But on a third basic subject The Times said: "One of man's most ancient rights in a free society is the privilege of using and disposing of his private property in whatever manner he deems appropriate."

Moreover: "We do not question the good faith of those who would abrogate this privilege. But we do feel, and strongly, that housing equality cannot safely be achieved at the expense of 'still another basic right."

Men of good will, certainly the vast majority of Americans, agree that the privilege of living wherever one's economic means permit is a desirable thing, and one which would ultimately eliminate the housing stresses that plague the minority segments of our citizenry. We consider it morally wrong to deny such housing to anybody, regardless of race, color or creed.

But artificial laws designed to hasten the process of social, as distinct from civil, justice can only exacerbate the situation—and, in the opinion of The Times, defeat their very purpose. Discrimination will disappear only when human prejudice succumbs to human decency.

The philosophical fallacy of the Rumford Act, unhappily, lies in seeking to correct such a social evil while simultaneously destroying what we deem a basic right in a free society.

Principle Backed

The Times agrees with the principle, expressed in regulations dealing with federally subsidized housing and reiterated in the Rumford Act, that housing created by assistance which derives from all the people should be equally available to all the people. As noted, this proposed amendment does not affect this principle as it applies to federally-assisted housing.

We would rather that the proposed amendment, under this principle, also exempted state-assisted housing. But it does not, and to this extent The Times believes the proposed amendment is defective.

The Times would have preferred an initiative that simply repealed present legislation which impairs the basic right of using and disposing of private property in whatever manner its possessors deem appropriate, and excepting only that which was acquired with "public assistance." Such a vote could have elicited the opinion of California citizens without writing an amendment into the State Constitution.

These preferences, however, are not before the electorate. The choice lies between the social aspirations of the Rumford Act and the fundamental rights of private property which the proposed initiative would restore.

In this circumstance, and on balance, The Times believes the amendment should be approved.

WHY SHOULD THE INITIATIVE CONSTITUTIONAL AMENDMENT BE ADOPTED?

The Initiative Constitutional Amendment to Protect Property Rights must be adopted to preserve your rights as a property owner. Any law should be repealed which says it is a "crime" for you to rent or sell your property to a person of your own choosing.

HEAVY FINES

Here is an example of the forced housing law in action:

A San Francisco jury recently awarded a $1,250 judgment against a property owner for the "crime" of refusing to rent his apartment to a Negro whom he considered to be an undesirable tenant. The case against the property owner was filed under the housing provisions of the Unruh Civil Rights Act, which this Initiative would repeal.

How would you like to pay such a fine for the "crime" of selecting your own tenant?

UNJUST CHARGES

A great many cases against property owners have already been filed with the FEPC under the provisions of the Rumford Act. An accused property owner is subjected to government inquisition, orders, penalties, and in some cases heavy fines.

The experience record of the FEPC shows that 65 percent of the cases filed with it (since its adoption in 1959) have been dismissed as unjust complaints. Yet the law provides for free legal counsel and government assistance for any person filing a complaint.

THE LAW MAKES NO PROVISION FOR DAMAGES FOR THE PROPERTY OWNER WHO IS UNJUSTLY ACCUSED.

WHERE IS THE FAIRNESS IN SUCH A LAW?

THERE IS NO CONFLICT BETWEEN HUMAN RIGHTS AND PROPERTY RIGHTS

Human rights and property rights are not severable.

People give property its value.

Every person of good will approves of ample housing accommodations for every American, but this objective must be achieved without destroying the property rights of the individual citizen.

We must remember that majorities as well as minorities have rights.

Harmonious intergroup relations are based on good will and human understanding. They are not based on government force and compulsion.

PROTECT YOUR HOME

VOTE "YES" ☒

INITIATIVE CONSTITUTIONAL
AMENDMENT TO PROTECT
PROPERTY RIGHTS

COMMITTEE FOR HOME PROTECTION
L. H. Wilson Robert Snell
609 S. GRAND AVE., LOS ANGELES, CALIF. 90017

PROTECT YOUR HOME . . .

VOTE "YES"

INITIATIVE CONSTITUTIONAL AMENDMENT TO PROTECT YOUR PROPERTY RIGHTS

". . . It is fundamental that in our democratic society, the rights the people have reserved to themselves must always be jealously guarded."

Judge Irving H. Perluss

★★★★★★★★★★★★★

WHAT IS THE INITIATIVE CONSTITUTIONAL AMENDMENT TO PROTECT PROPERTY RIGHTS?

The official title of the Initiative measure reads as follows:

SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places.

The proposed Initiative Constitutional Amendment will restore the right of property owners to sell, lease, or rent their real property to persons of their own choosing. This constitutionally guaranteed right has been partially taken away from you by recently enacted laws in California.

The Initiative will outlaw forced housing. It will guarantee in plain and simple language the right of any property owner to sell, rent, or lease all or part of his property to any person he chooses.

★★★★★★★★★★★★★

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IS THIS INITIATIVE CONSTITUTIONAL?

The Initiative Constitutional Amendment to Protect Property Rights is constitutional.

Article I of the Constitution of California says: "All men ... have certain inalienable rights, among which are those of ... acquiring, possessing, and protecting property ..."

The right of the people to initiate legislation is clearly guaranteed by California's Constitution.

Article IV of the Constitution says:

> The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.
>
> The first power reserved to the people shall be known as the initiative.

Some groups, who apparently have little understanding of our democratic principles, have sought to deny the people their right to vote on this Initiative Constitutional Amendment.

In denying their application for a preliminary injunction, Judge Irving Perluss of Sacramento said:

> "... It is fundamental that in our democratic society, the rights the people have reserved to themselves must always be jealously guarded."

IT IS NEVER UNCONSTITUTIONAL FOR THE PEOPLE TO EXERCISE THEIR CONSTITUTIONAL RIGHTS.

★★★★★★★★★★★★★

★★★★★★★★★★★★★

WHAT LAWS WOULD THE INITIATIVE CONSTITUTIONAL AMENDMENT REPEAL?

The Initiative Constitutional Amendment to Protect Property Rights would repeal the Rumford Forced Housing Act and the provisions of the Unruh Civil Rights Act which interfere with the rights of private property owners.

Essentially, the Rumford Act says that a home owner must not refuse to sell, rent, or lease his property on the basis of race, color, creed, or national origin.

This means that the home owner can be punished and fined if he insists on selling or renting his own residential real property to someone of his own faith, or his own race, instead of someone of a different race or faith. The American right of freedom of choice is taken away by this act. In the place of freedom of choice is substituted forced housing.

The Rumford Act has provided an open season on the home owners for forced housing witch hunters.

Under the Rumford Act, the so-called Fair Employment Practices Commission hears cases and the property owner has the right to appeal FEPC decisions to the courts. If the courts rule against the owner and he refuses to obey the decision, the property owner can be held in contempt of court. One of the possible punishments in contempt proceedings is imprisonment. This is a heavy price to pay for the "crime" of renting or selling your property to a person of your own choosing.

★★★★★★★★★★★★★

READ THE AMENDMENT ☆☆☆☆☆☆☆☆☆☆☆☆

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.

NOW YOU KNOW IT RESTORES YOUR FREEDOM—VOTE 'YES' #14 NOV. 3

Your 'YES' Vote on Proposition #14 will

- ☆ Restore your Freedom to Sell or Rent your Property to Anyone You Choose
- ☆ Stop Police State Practices
- ☆ Promote Friendly Community Relations
- ☆ Restore Constitutional Protection to Homeowners
- ☆ Eliminate Tyranny of a Bureaucratic Commission
- ☆ Remove Risk of Heavy Economic Losses

COMMITTEE FOR YES ON PROPOSITION #14
TO ABOLISH RUMFORD FORCED HOUSING ACT

609 SOUTH GRAND AVENUE
LOS ANGELES 17

703 MARKET STREET
SAN FRANCISCO 5

HOWARD L. BYRAM, STATE CHAIRMAN

CALIFORNIANS SHOULD HAVE ☆ FREEDOM ☆☆☆☆☆ OF ☆☆☆☆☆☆☆☆☆☆ CHOICE ☆☆☆☆☆☆

WHY 'YES' ON PROPOSITION #14?

YES Vote Will **restore** to California property owners the right to choose the person or persons to whom they wish to sell or rent their residential property.

YES Vote Will **abolish** those provisions of the Rumford Forced Housing Act of 1963 which took from Californians their freedom of choice in selling or renting their residential property.

YES Vote Will **amend** our California Constitution so that the only way future legislation could take away the freedom of choice in selling or renting of residential property would be by vote of the people.

YES Vote Will **halt** the State Fair Employment Practices Commission's harassing and intimidating the public and property owners in the exercising of their freedom of choice.

YES Vote Will **end** State police power over the selling or renting of privately owned residential property.

YES Vote Will **restore** rights basic to our freedom—rights that permit all persons to decide for themselves what to do with their own property.

That Long, Long Arm of the Law—

The Rumford Forced Housing Act's police arm is long and strong.

It can reach almost any Californian—almost anyone who owns or rents a place to live. Owner. Tenant. Yes, and neighbor, too!

First, it reaches the owner. It takes away his right to choose his tenants or buyers.

Then it takes away a tenant's or buyer's right—the right to choose his neighbors.

If the owner insists on his freedom to choose, the long arm can reach out and make him pay a complainant up to $500; and further insistence by the owner can make him subject to contempt of court penalties.

If a tenant advises the owner to use freedom of choice, the long arm can reach the tenant with the same penalties.

In the matter of giving advice, even the neighbor must beware. That same long arm can put the neighbor in the same penalty box as the tenant!

14 SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places.

YES	X

OWNERS! TENANTS! NEIGHBORS!

GET BACK YOUR RIGHTS!

VOTE "YES" ON PROPOSITION #14

SOME QUESTIONS AND ANSWERS DEMONSTRATING THE NEED FOR A "YES" VOTE ON PROPOSITION 14

1. What is Proposition 14?

Proposition 14 is a proposed initiative amendment to the California Constitution. It earned its place on the November 3 ballot when unpaid volunteers from all parts of the state obtained 633,206 valid signatures on petitions, thus giving the people an opportunity to vote on the proposition.

2. What does Proposition 14 propose to do?

Proposition 14 proposes to abolish those provisions of the Rumford Forced Housing Act which have taken away from California residential property owners their right to choose the person or persons to whom they may wish to sell or rent their property.

3. How would Proposition 14 do this?

A "Yes" vote for Proposition 14 would restore to the property owner his right of choice in disposing of his property, by causing to be placed in our State Constitution, the following language (quoting the essential paragraph of the amendment protecting the property owner):

"Neither the State, nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

4. Why is such a Constitutional Amendment necessary?

It is necessary because in the closing hours of the 1963 session of the Legislature the Rumford Forced Housing Act was rammed through and became a law on September 20, taking from the property owner his freedom of choice in disposing of or renting his property.

5. Why does it take a Constitutional Amendment to restore to the property owner the right to choose his purchaser or tenant, rather than to have a referendum repeal?

The Constitutional Amendment is necessary so that never again can the legislature, under political pressure and coercion, enact such a measure without first referring it to a *vote of the people.* Otherwise, if the Rumford Forced Housing Act were merely repealed by a referendum vote, a future legislative session could re-enact such objectionable legislation.

6. Briefly, how does the Rumford Forced Housing Act take from the property owner his freedom of choice in selling or renting his property?

The Act provides, in effect, that if a property owner is charged with refusing, on alleged religious or racial grounds, to sell or rent property he has on the market, he can be forced to appear before the Fair Employment Practices Commission and prove his innocence of the charges. The person making the charge does not have to go to court and file a complaint against the owner—he merely files it with the FEPC.

If the FEPC concludes the complainant is justified in his charges, then it can force the property owner to do one of three things, specified in the Act as follows:

(1) Sell or rent the housing accommodation in question to the aggrieved person, if the property is still available.

(2) Sell or rent a like accommodation, if one is still available, or the next vacancy in a like accommodation.

(3) Pay damages to the aggrieved person in an amount not to exceed $500, if the FEPC determines that neither of the remedies under (1) or (2) is available.

If the FEPC commissioner assigned to the case believes the owner has violated the Rumford Forced Housing Act, he may tie up the owner's property for sale or rental by bringing an action in Superior Court to restrain the owner from selling or renting until the commission has completed its investigation and made its determination, which must be done within 20 days.

Under the provisions of this act, legal maneuverings by the commission's attorneys could tie up an owner's property for a considerable length of time.

7. How does the FEPC proceed against a property owner when a charge of discrimination has been filed?

The charge is referred to a member of the commission. An investigator is sent out to interview the owner. If the owner cannot convince the investigator that he is innocent, and if the assigned commissioner believes "that probable cause exists for believing the allegations of the complaint, he shall immediately endeavor to eliminate the alleged practice (by the owner) by conference, conciliation and persuasion" (quoting from the Rumford Act).

If the owner still resists the charge, an accusation is filed against him and he is forced to appear at a hearing. Eventually, contrary to statements by official proponents of the Act that there is no punitive action provided for in the Act, the commission may, if it considers the owner guilty, order him to pay the "aggrieved person" not to exceed $500. (See again question No. 6.) The owner may appeal to the courts from the findings and orders of the commission but cannot get a jury trial on the issue in dispute.

8. When the owner takes his case to court, does he and does the one filing the complaint have attorneys to handle their case?

The owner would be foolish not to retain counsel, but the party complaining is represented by the State of California in the role of counsel for the FEPC.

9. Can the FEPC take the accused into court?

Yes, if the accused violates the commission's order, the commission may ask a Superior Court to enforce the order, and the violator then is subject to contempt of court, for which he could be sent to jail, if he violates a court order.

10. What is the Fair Employment Practices Commission?

The FEPC was created by the Legislature about five years ago for the purpose of handling the problems of alleged discrimination in hiring practices in the state because of race, religion, or national origin. This lies in the field of the so-called minority groups. It should be pointed out that the members of the commission are political appointees of the governor. No governor would appoint anyone to such commission who was not either a member of or very sympathetic to minority groups, particularly those groups highly active and vocal in the field of so-called civil rights. Furthermore, such commission would not be likely to have as objective an approach to a case involving alleged racial discrimination as would a judge presiding in a case before the court.

11. Some provisions of the Rumford Forced Housing Act apply to "Publicly assisted housing." What does that mean?

"Publicly assisted housing" means housing Federally insured through the FHA, or Veterans' Administration, or the California Veterans' loans, for the main part. There are minor definitions. It is estimated that the Rumford Forced Housing Act affects about 70 per cent of the residential property in the state, including apartment rentals.

12. Are all residential rental units affected by this Act and how do persons who rent feel about it?

All rental units of five or more on a property are affected and it is the experience of owners of such units that their tenants are, for the most part, in favor of Proposition 14 abolishing the Rumford Forced Housing Act.

13. Some argue that this amendment to the Constitution would halt urban renewal projects in the state. Is this true?

No. Contrary to what some say, the amendment does not interfere with the right of the state or federal government to enforce contracts made with private parties. This would include federal urban renewal projects, college housing programs and property owned by the state or acquired by condemnation. Simply said, the amendment would restore the law to what it was before enactment of the forced housing laws. Urban renewal was going

on before those laws were passed. There is no reason why urban renewal should not continue after those laws are abolished. In 40 or so other states the property owner is free to sell or rent his property to persons of his choice. The federal government has not withheld urban renewal funds in those states. Withholding urban renewal funds is just campaign "scare talk."

14. Will this initiative Constitutional Amendment prevent property owners from selling or renting their property to persons of minority groups?

NO! If Proposition 14, this amendment, is approved by the voters, any property owner can sell or rent his property to anyone he sees fit to deal with, regardless of race, color, religion, or national origin.

15. How do people generally feel about this Constitutional Amendment—Proposition 14—on the November ballot?

Every public opinion poll taken on this question since the Rumford Forced Housing Act was passed has shown that a very substantial majority of the people are opposed to the Act and are for its abolition as proposed in Proposition 14. As a matter of fact, the polls show that as time has passed since the enactment of the Rumford Forced Housing Act, the percentage of those opposed to the Act and in favor of abolishing it has increased.

16. Why is a "YES" vote needed on Proposition 14?

The Rumford Forced Housing Act has taken from the California property owner his fundamental right of freedom to choose those to whom he wishes to sell or rent his property. Passage of Proposition 14 would restore that right.

17. How will passage of Proposition 14 affect owners of property carrying FHA and GI Veteran loans?

Proposition 14 will restore freedom of choice to such owners, thus removing the unfair limitations placed on them for having obtained mortgage financing if such freedom was not restricted when the loan was obtained.

18. How are hotels and motels affected by the Rumford Forced Housing Act?

They are not affected. All hotels and motels and places of public accommodation are specifically excluded from both the Rumford Forced Housing Act and Proposition 14.

19. Why are some properties bound by the Rumford Forced Housing Act while others are not?

The reasoning behind this discrimination can not be justified. If the principle were sound, it should apply to owners of all home and residential properties.

20. How is the average home owner or owner of rental property going to know for sure whether his property is covered by the Act or not?

The only certain way is to hire a lawyer. This is one of the reasons the Act is unreasonable. Any law that affects directly millions of people and perhaps makes them liable to penalties should be simple and understandable to the layman.

21. What if a property owner has been wrongly accused of discrimination and proves his innocence. Who pays his lawyer and other expense of defending himself?

He does. He must bear all of the expense of defending himself—win or lose.

22. If an apartment is rented to a person of a minority group and other tenants move out, can an owner collect from the State for loss of income or even loss of the property if mortgage payments are not kept up because of this situation?

No. The property owner has to bear all of the risk and all of the loss.

23. What effect will the Federal Civil Rights Act of 1964 have upon the State constitutional amendment, Proposition 14?

None. There is no conflict between the two.

24. We have laws regulating property, such as zoning and health and safety restrictions. Isn't the Rumford Forced Housing Act just one more property regulation?

No., Zoning, health, safety, etc., restrictions are on the property only. Under the Rumford Forced Housing Act, the State has power to force one private citizen to make a contract with another private citizen. This is entirely different than the code restrictions on property.

Here is how Proposition 14 will be identified on the ballot November 3, 1964

"SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, and similar public places."

★ ★ ★ ★ ★

A "Yes" Vote will add this wording to the California Constitution:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article 1, Sections 14 and 14½, of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Article are severable.

petitions. The Association withheld support on grounds that the referendum would repeal only the Rumford Act, that the Legislature could pass another such act at a future session, and that local governmental bodies such as cities and counties would still be free to propose and adopt any such legislation they cared to. The referendum failed to collect the required number of signatures in the time allotted by law.

BIRTH OF THE INITIATIVE

In August, 1963, The California Real Estate Association, California Apartment Owners Association, and homebuilder groups agreed that an initiative constitutional amendment restoring the property owner's freedom of choice, was a necessity. The power of initiative is provided under Article IV, Section 1 of the California Constitution:

"The Legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

"The first power reserved to the people shall be known as the initiative."

When the California Real Estate Association met in convention in September, the assembly of a thousand directors approved almost unanimously a motion to support a committee formed to place the initiative before the people at the next general election.

The essential paragraph of the initiative measure reads:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The initiative measure expressly applies only to residential housing and does not disturb provisions in California Law which forbid discrimination in public accommodations such as hotels and motels, or in businesses.

It does not affect the laws of contract, except to restore freedom of consent to both parties. This means that it cannot, as some claim, supercede clauses in FHA or other federal government contracts prohibiting discrimination, such contracts having been freely entered into by both parties.

Approval of the initiative measure will insure that any legislation in the future which would abridge the freedom of choice of the individual as defined in the amendment must first be submitted directly to the electorate for a vote.

The net effect of the initiative is to return California law, as it affects residential property, to its status before 1959. It provides that all citizens, which would include minority group members, shall have equal freedom to acquire, sell or rent property.

ARGUMENTS OF THE OPPOSITION

1. A common argument against the initiative measure is that the Rumford Act should be given a chance to see if it will work. The question is not whether it will work, but whether it is an unwarranted infringement on freedom of choice. Should we as well give up freedom of speech, for instance, to see if we get used to going without it?

2. Another argument says that the initiative is designed to further religious and racial discrimination. It does no such thing. It provides equality under law for all citizens, leaving the moral issue of religious and racial discrimination to be resolved by individuals, not by legislative force.

3. The opposition contention that the initiative is discriminatory has brought their challenging voices into the courts.

In January, 1964, opponents requested a superior court in Sacramento to enjoin county clerks from accepting signatures on petitions on grounds that the initiative was unconstitutional. Judge Irving H. Perluss denied the request, saying: *"It is fundamental that in our democratic society the*

rights the people have reserved to themselves must always be jealously guarded."

The California Democratic Council, in another action, requested a superior court in San Bernardino to stop county clerks there from accepting petitions, again on alleged constitutional grounds. Judge Joseph T. Cieno ruled against the C.D.C., saying, "This is a matter which should be passed on by the courts, if and when the initiative is passed by voters."

The question of the constitutionality of the initiative was recently put to the Legislative Counsel of the State of California. The reply, dated February 2, 1964, stated: *"We believe that the measure would probably be held to be constitutional."*

The Legislative Counsel's opinion also pointed out that the amendment does not discriminate against citizens for reasons of race, color, religion, national origin or ancestry, and added: *"It is our opinion, therefore, that the initiative measure, if adopted, would be held not to violate the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution."*

4. Opponents of the initiative often argue that it will cause racial bitterness. The *Los Angeles Times,* in an editorial February 2, 1964, supporting the initiative, spoke of the Rumford Act itself as a more likely cause of bitterness. It wrote: *"Artificial laws designed to hasten the process of social, as distinct from civil, justice can only exacerbate the situation—and, in the opinion of The Times, defeat their very purpose. Discrimination will disappear only when human prejudice succumbs to human decency.*

"The philosophical fallacy of the Rumford Act, unhappily, lies in seeking to correct such a social evil while simultaneously destroying what we deem a basic right in a free society."

The initiative, by removing such force and restoring a basic right equally to all citizens, should relieve tensions between ethnic groups, leaving human decency and good will as powerful allies in overcoming prejudice.

FREEDOM OF CHOICE vs. FORCED HOUSING

A discussion of the grounds for the California Real Estate Association's support of an initiative constitutional amendment to restore in California the property owner's right to sell or rent his property to whomever he chooses.

THE CALIFORNIA REAL ESTATE ASSOCIATION
117 West Ninth Street
Los Angeles, California 90015

BACKGROUND

On September 20, 1963, Assembly Bill 1240, often called the Rumford Act after one of its principal authors, became law in California. The Act states that *"The practice of discrimination because of race, color, religion, national origin or ancestry in housing accommodations is declared to be against public policy."*

It declares further: *"This part shall be deemed an exercise of the police power of the State for the protection of the welfare, health, and peace of the people of this State."*

The Act then specifies housing coming under its jurisdiction as:

1. All publicly assisted housing which are multiple dwellings.
2. All publicly assisted single family dwellings which are owner occupied.
3. All multiple dwellings of five or more units, however financed.

The term "publicly assisted" refers to housing federally insured through the Federal Housing Authority or Veterans' Administration, Calvet loans, housing which is tax exempt for any reason except the owner's veteran status, or housing constructed on land acquired by the State or sold by the State below cost.

Exempt from "multiple dwellings" covered are hospitals, convents, monasteries, and public institutions.

The Unruh Civil Rights Act (Section 51 of the Civil Code), which went into effect in 1959, provides: *"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."*

While the Unruh Act applies to business establishments, decisions by the courts in California have construed it to cover the "business" of apartment renting. In the case of *Swan v. Burkett* (209 C.A. 2d, 685; Nov. 1962) an owner of a three-

unit apartment building was ruled under jurisdiction of the Act since he was renting a dwelling for gain.

ENFORCEMENT

Under the Unruh Act, the complainant may enter suit through the courts.

Under the Rumford Act, enforcement is vested in the Fair Employment Practices Commission. If the complainant elects FEPC enforcement, he waives procedures available through the courts under the Unruh Act.

If the FEPC finds discrimination and attempts at conciliation fail, it is empowered to take one of these actions:

1. Order the sale or rental to the complainant if the housing accommodation is still available.
2. Order the sale or rental of a like accommodation, if one is available, or the next vacancy in a like accommodation.
3. Order the payment of damages not to exceed $500 if neither remedy (1) or (2) is available.

If the accused violates the commission's order, the commission may ask a superior court to enforce the order, with the violator subject to contempt of court. Under contempt of court proceedings, the violator can be jailed.

All commission orders are appealable to the courts.

VIOLATES RIGHTS

Our nation was founded as a free society granting equality under law to all of its citizens. As part of this philosophy of government, individual citizens have traditionally been allowed entire latitude in acquiring and using property to their own benefit, so long as that property use does not constitute a threat to the health or safety of other citizens.

The Rumford Act, and the Unruh Act as it applies to housing, violate this guarantee of equal treatment under law as defined in the Fourteenth Amendment to the Constitution, part of which provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Rumford Act, by granting one group of citizens' rights for reason of race, color, religion, national origin or ancestry, necessarily takes equivalent rights away from the rest of the citizenry. This is denying equal protection under the laws.

Since the Act is intended to forbid discrimination against minority groups, the effect is to force a property owner to sell or rent to a person of a minority group, provided he is otherwise qualified, whether the owner wants to or not.

ABRIDGES PRIVILEGES

This abridges the privileges of property ownership. Under our system of free enterprise the individual has control over the use and sale of his property until he freely transfers it to another. To deny him that right and substitute for his free consent an order by the state, backed by its police power, amounts to confiscation by the state. The state is saying, in effect, that the owner may keep his freedom of choice so long as his choice agrees with that of the state. If the state does not agree, it will take away the property owner's freedom by dictating what that choice must be.

Such control of private property by the State is what distinguishes the Communist form of government from our own system. The Communist approach assumes that public welfare always takes precedence over individual desires. Once that assumption has been made it follows that the State must designate itself to decide what constitutes public welfare.

The State of California has reversed the procedure by first declaring that discrimination is against public policy. Having established that premise, the rights of the individual property owner or his desires no longer take precedence.

Zoning regulations apply to the property itself rather than the owner and apply equally to any-

one who owns or rents it and therefore, do not abridge the owner's constitutional rights.

CLAIM "HUMAN RIGHTS"

What is the reason for this denial of equal rights to all citizens? Supporters of the Rumford Act justify it as a means of giving a minority group member the "human right" to buy or rent housing wherever he chooses, provided he has the money and is otherwise a desirable citizen.

Morally, this is an admirable goal. But the moment this desire by the individual for what is not his is granted by law, over the wishes of the owner, it ceases to be admirable. As a resolution adopted by the American Council of Christian Churches states:

"The right of private property is a human right required by the Commandment, 'Thou shalt not steal,' and is absolutely fundamental to all other rights guaranteed in the Bill of Rights. To pit so-called 'human rights' against property rights as if the former override the latter is a specious and misleading argument. If property rights go, all rights go."

All contractual relations under American law, to be valid, have always rested on mutual consent between the parties. The law provides that a contract may be declared invalid if it is proved that one party used force to accomplish it. It is a shocking repudiation of this principle when a state legislature writes into law that force in some contracts is legal.

This is why the term "fair housing" applied to such contracts is a flagrant misnomer. It is not fair housing; it is forced housing.

FOUGHT LEGISLATION

The California Real Estate Association fought against legislation similar to the Rumford Act in the 1961 Legislature; that bill, AB 801, was defeated. It fought AB 1240 in the 1963 legislative session; that bill was passed and became law.

Immediately, some citizens who objected to the law, began a referendum to repeal the Act. While the California Real Estate Association was in sympathy with their aim, it did not join in the effort to gather the necessary voter signatures on

PROPERTY OWNERS' BILL OF RIGHTS

In 1789, the people of America were fearful that Government might restrict their freedom. The first Congress of the United States, in that year, proposed a Bill of Rights:

The Bill of Rights, essentially, tells the Government what it cannot do. The statements comprise the first ten amendments to the United States Constitution.

The Bill of Rights has had a profound impact upon the history of the World.

Forty million Immigrants gave up much to come to this land, seeking something promised here—and only here. Many countries have abundant natural resources, vast vacant lands and climate as good as America.

They came here for the promise of security—the promise of freedom—for the precious right to live as free men with equal opportunity for all.

In July of 1868, a new guarantee of freedom was ratified. Its purpose was to guard against human slavery. Its guarantees were for the equal protection of all.

This new guarantee of freedom is the 14th Amendement. It reads, in part, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

The vital importance of these federal laws was reemphasized in a recent statement of the Chief Justice of the United States in which he urged the retention of "Government of laws in preference to a Government of men."

Today, the rights and freedoms of the individual American property owner are being eroded. This endangers the rights and freedoms of all Americans. Therefore, a Bill of Rights to protect the American property owner is needed.

It is self-evident that the erosion of these freedoms will destroy the free enterprising individual American.

It is our solemn belief that the individual American property owner, regardless of race, color or creed, must be allowed, under law, to retain:

1. The right of privacy.

2. The right to choose his own friends.

3. The right to own and enjoy property according to his own dictates.

4. The right to occupy and dispose of property without governmental interference in accordance with the dictates of his conscience.

5. The right of all equally to enjoy property without interference by laws giving special privilege to any group or groups.

6. The right to maintain what, in his opinion, are congenial surroundings for tenants.

7. The right to contract with a real estate broker or other representative of his choice and to authorize him to act for him according to his instructions.

8. The right to determine the acceptability and desirability of any prospective buyer or tenant of his property.

9. The right of every American to choose who, in his opinion, are congenial tenants in any property he owns — to maintain the stability and security of his income.

10. The right to enjoy the freedom to accept, reject, negotiate or not negotiate with, others.

Loss of these rights diminishes personal Freedom and creates a springboard for further erosion of Liberty.

National Association of Real Estate Boards
36 South Wabash Ave., Chicago 3, Illinois
Approved, June 4, 1963

Published as a Public Service

California Real Estate Association
117 West 9th Street, Los Angeles 15, California
Original Copy Approved, March 16, 1963

HELP!

RESTORE YOUR RIGHT TO SELL OR RENT YOUR HOME TO ANY PERSON YOU CHOOSE!

☒ VOTE "YES"

ON PROPOSITION 14

Committee For- **YES** on **PROPOSITION 14**
To Abolish The **RUMFORD FORCED HOUSING ACT**
609 So. Grand Avenue, Los Angeles, Calif. 90017

YES 14

ABOLISH RUMFORD ACT

RESTORE PROPERTY RIGHTS

The *Truth* about the Rumford Act

Trial, WITHOUT JURY, before a board of political appointees selected by the governor (para. 35730 and Sec. 1414 Labor Code).

You are ASSUMED GUILTY until you prove yourself innocent, at your own expense (para. 35734).

You have NO APPEAL to a constituted court of law which would allow you trial by jury (para. 35738).

If you do not prove your innocence to the satisfaction of the governor's appointees you may be "FINED" up to $500 (para. 35738).

Your money is then given to the informer as a "REWARD" (para. 35738).

You have NO PROTECTION from professional informers — persons who just shop around, hoping to be turned down so they can collect $500.

If you refuse to pay you can be IMPRISONED on contempt of court charges.

Read The Rumford Act For Yourself

AND SEE WHY

Not ONE of Orange County's FOUR Legislators Voted For It

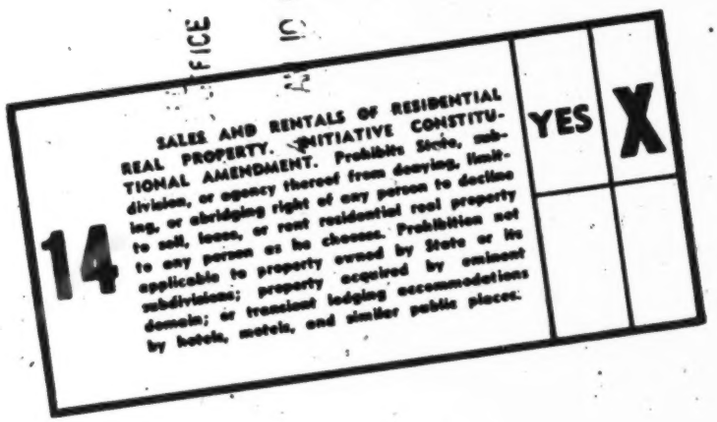
★ ★ ★

THE ORANGE COUNTY CHAPTER OF THE CITIZENS COMMITTEE FOR A YES ON #14

Headquartered at: 322 West 17th Street, Santa Ana, Calif.

BELIEVES . . .

That EVERY citizen regardless of his Race, Color or Religion should have the CIVIL RIGHT to manage or dispose of his Real Property Without Governmental Intervention.



The *Facts* about Proposition #14

YES VOTE — **Will RESTORE to California property owners the right to choose the person or persons to whom they wish to sell or rent their residential property.**

YES VOTE — **Will ABOLISH these provisions of the Rumford Forced Housing Act of 1963 which took from Californians their freedom of choice in selling or renting their residential property.**

YES VOTE — **Will AMEND our California Constitution so that the only way future legislation could take away the freedom of choice in selling or renting of residential property would be by vote of the people.**

YES VOTE — **Will HALT the State Fair Employment Practices Commission's harassing and intimidating the public and property owners in the excercising of their freedom of choice.**

YES VOTE — **Will END State police power over the selling or renting of privately owned residential property.**

YES VOTE — **Will RESTORE rights basic to our freedom that permit all persons to decide for themselves what to do with their own property.**

RESTORE AND PROTECT
For ALL Californians
"FREEDOM OF CHOICE"

VOTE **YES** **X** on Proposition 14

An UNINFORMED or MISLED Vote could cost you your FREEDOM

MAR 3 1967

SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, et al.,
Petitioners,

vs.

LINCOLN W. MULKEY, et al.,
Respondents.

CLARENCE SNYDER,
Petitioner,

vs.

WILFRED J. PRENDERGAST, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF, AMICUS CURIAE
and
BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMICUS CURIAE

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San Francisco, California 94105,
Attorney for Amicus Curiae.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Civil Liberties Union of Northern California respectfully moves for leave to file a brief as *amicus curiae* in this case. The consent of the attor-

neys for respondents has been obtained. The consent of the attorneys for petitioners was requested but refused.

Amicus is a non-profit organization which has participated in significant civil liberties causes for the thirty-three years of its existence. Counsel for *amicus* was counsel in the Supreme Court of California in two cases[1] also raising the issue of the validity of Proposition 14. Neither of the losing parties in those cases chose to carry them further. One of the two cases is still pending, the other having been settled before trial. *Amicus* believes that the constitutionality of Proposition 14 which is at issue in this litigation, poses a highly significant constitutional question as to which the Court should have a number of varied legal arguments.

An examination of the briefs filed in the Court below suggests that the arguments which we offer will not be presented by the respondents in these cases.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,

MARSHALL W. KRAUSE,
Staff Counsel, American Civil Liberties Union
of Northern California,
Attorney for Amicus Curiae.

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[1] *Thomas v. Goulis*, 64 Cal.2d 884, and *Grogan v. Meyer*, 64 Cal.2d 875.

In the Supreme Court
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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AS AMICUS CURIAE

OPINION BELOW

The opinion of the California Supreme Court in *Mulkey v. Reitman* is reported at 64 C.2d 529, 50 Cal. Rptr. 881, 413 P.2d 825, and *Prendergast v. Snyder* is reported at 64 C.2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847.

SUMMARY OF ARGUMENT

The effect of Proposition 14 (which, if lawful, would add Section 26 to Article I of the Constitution of California) is to create a constitutional right to discriminate on the basis of race in the sale or rental of housing in California.

The establishment of such a right has the effect of encouraging race discrimination in the housing market. Unlike the mere repeal of unwanted legislation, it provides great assurance that in the future the practice of race discrimination will not be disturbed, either by legislative, executive, or judicial action on a statewide basis, or by governmental action on a municipal basis. Moreover, the establishment of a *constitutional right* of any kind inevitably carries the connotation that the State does not find the exercise of that right morally objectionable. This alters the moral climate in California with regard to race discrimination in housing, thus further encouraging the practice of such discrimination.

ARGUMENT

INTRODUCTION

The purpose of this brief is to suggest arguments in support of the judgment of the California Supreme Court. In our view the importance of the issues which this case presents makes it fruitless to seize upon, as petitioners have done, isolated language in the opinions of the Court below. While this tends toward depicting the judgments which peti-

tioners attack as radical departures from accepted doctrine, it also obscures analysis. As a result, the central theme of the California Supreme Court's opinion—that Proposition 14 encourages and assists acts of race discrimination—is virtually ignored and nearly all of petitioners' brief is devoted to other, irrelevant, matters. We propose to bring, in the pages that follow, the real issues in these cases into clearer focus.

Because petitioners' brief contains so many criticisms of theories advanced—or, rather, which petitioners assert have been advanced—in support of the judgment here under review, we believe it will be helpful to state what it is *not* necessary to contend to support the judgment below:

(1) We do not here urge obliteration of the distinction between state and private action. The Court reiterated last term that the Equal Protection Clause reaches only "state action" in *United States v. Guest*, 383 U.S. 745 (1966); this case presents no occasion whatever to question that principle.

(2) Nor do we urge that a state, having enacted "fair housing" legislation, is forever barred from repealing it. The California Supreme Court's opinion perhaps lends itself to interpretation as having adopted such a principle. We may agree with the petitioner that adoption of such a principle would constitute a radical extension of constitutional doctrine. But the considerable discussion devoted in petitioners' brief to this aspect of the case is an attack on a straw-man. The vice of Proposition 14 is that it

goes far beyond mere repeal of the existing fair housing legislation in California and enshrines the affirmative right to discriminate in the State's Constitution.

(3) We do not here contend that the State has an affirmative duty to prevent acts of private race discrimination in the housing market. Indeed, despite an assertion to the contrary in the petitioners' brief,[2] the California Supreme Court advanced no such notion, expressly stating its view that the "Fourteenth Amendment does not impose upon the State the duty to take positive action to prohibit a private [act of] discrimination." *Hill v. Miller*, 64 C.2d 757, 759, 51 Cal. Rptr. 689, 415 P.2d 33 (1966), decided together with the instant cases. This case does not, therefore, require consideration of whether the absence of *any* legislation in the area of housing presents problems of constitutional stature. Indeed, we assume that it does not.

(4) We do not argue that *Shelley v. Kraemer*, 334 U.S. 1 (1948), disposes of this case. This Court is doubtless aware of the scholarly discussion which *Shelley* has generated; although these questions are of considerable interest, they need not be resolved here. We do not understand the decision of the California Supreme Court to rest on *Shelley*.[3] In any

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[2] "By invalidating Section 26 the Court below has held that the failure of California to provide a remedy which it once provided . . . violates the equal protection clause." Brief for Petitioners, p. 28.

[3] Although the Court below in *Prendergast v. Snyder* seemingly approved the *Shelley* rationale adopted by the trial Court, its opinion elsewhere states, in reference to *Abstract Investment Co. v. Hutchison*, 204 Cal.App.2d 242, 22 Cal. Rptr, 309 (1962)

event, the judgment in these cases can be sustained without relying on *Shelley* in any way. There is, therefore, no occasion to consider whether the principle announced in *Shelley* applies to situations other than that where there is judicial enforcement of racial restrictions contrary to the wishes of a seller and buyer.

I. PROPOSITION 14 CREATES A CONSTITUTIONAL "RIGHT" TO DISCRIMINATE IN THE SALE OR RENTAL OF HOUSING AND THEREBY LENDS THE APPROVAL AND SANCTION OF THE STATE TO ACTS OF RACIAL DISCRIMINATION IN THE HOUSING MARKET.

A. Proposition 14 Creates a Constitutional "Right" to Discriminate in the Sale or Rental of Housing.

The addition of Article I, Section 26 to the Constitution of California would work radical changes in the fabric of California's legal and social structure as respects racial discrimination in the field of housing.[4] The *effect* of the Amendment[5] would be to

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(holding that *Shelley* bars judicial enforcement of a landlord's desire to evict a tenant for racial reasons): "[W]e are not required to rely upon that case in affirming the judgment herein." 64 C.2d at 879.

Moreover, the Court below refused to extend the *Abstract* case's broad reading of *Shelley* in a companion to the instant cases, *Hill v. Miller*, 64 C.2d 757, 51 Cal. Rptr. 689, 415 P.2d 33 (1966). In *Hill*, no state legislation was applicable. Plaintiff sued to restrain his landlord from evicting him on the sole ground of his race. Although it was alleged that the landlord intended to seek *judicial* relief through an unlawful detainer action, the Court below denied relief rejecting plaintiff's *Shelley-Abstract* argument.

[4]Prior to the passage of Proposition 14, opponents of fair housing legislation had been unsuccessful in stemming the tide. The Unruh Act (Calif. Civ. Code §§ 51-52), which bars discrimination by "business establishments", was enacted in 1959. It was thereafter held to apply to real estate brokers, *Lee v. O'Hara*, 57 C.2d 476, 20 Cal. Rptr. 617, 370 P.2d 321 (1962), to apartment

establish a *constitutional right* to discriminate on racial[6] grounds in the sale or rental of California residential property. This right is based on far more than the mere absence of any legislation forbidding such discrimination. Rather, the "right" of which we speak is derived from several distinctive features of Proposition 14:

(1) Without a further amendment of the California Constitution, the Legislature is disabled from enacting "fair housing" legislation of any kind or description. Presumably, since the entire field is withdrawn from the legislative domain, the Legislature is even barred from investigating the need for such legislation.

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buildings of 3 units or more, *Swann & Burkett*, 209 Cal.App.2d 685, 26 Cal. Rptr. 286 (1962), and to commercial real estate developers, *Don Wilson Builders v. Superior Court*, 220 Cal.App.2d 77, 33 Cal. Rptr. 621 (1963). In addition, the Hawkins Act (Cal. Stat. 1959, ch. 1681, at 4074, formerly Calif. Health & Safety Code § 35700 et seq.), which the Rumford Act superseded, barred discrimination in certain "publicly assisted" multiple housing. The Rumford Act (Calif. Health & Safety Code § 35700 et seq.) consolidated the coverage of Unruh and Hawkins, generally speaking, and added a procedure for administrative enforcement modeled after California's earlier Fair Employment Practices Act (Calif. Labor Code § 1410 et seq.).

[5]For the present, we need not inquire as to the "purpose" of Proposition 14. Our immediate concern is with its effect. Petitioners, who raise Article I, Section 26 as a defense to charges that they violated California's anti-discrimination laws, appear to be in agreement with our view as to the Amendment's effect.

[6]The language of the Amendment is not, of course, confined to race; it purports to protect the "right" of the property owner to "decline to sell, lease or rent . . . to such person or persons as he, in his absolute discretion, chooses." Petitioners do not dispute that, as a matter of California law, Proposition 14 at the least operates in the field of race discrimination to nullify existing "fair housing" legislation and to forbid similar future legislation. See 64 C.2d at 533-535, where the California Supreme Court so found.

(2) Municipal and other local governments are similarly disabled.[7]

(3) The executive branch of California's government is precluded from taking any action in this field such as President Kennedy took in barring discrimination in federally assisted housing (Executive Order, No. 11063, 27 Fed. Reg. 11527 (1962)).

(4) California's judiciary is likewise barred from developing common-law principles forbidding race discrimination in housing as it did with regard to discrimination by labor unions, see *James v. Marinship Corp.*, 25 C.2d 721, 155 P.2d 329 (1944); *Williams v. Boilermakers*, 27 C.2d 586, 165 P.2d 903 (1946), and *de facto* segregation in the public schools, see *Jackson v. Pasadena City School District*, 59 C.2d 876, 881-882, 31 Cal. Rptr. 606, 382 P.2d 878 (1963) (state policy requires school boards to take steps to alleviate sub-

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[7]Article I, Section 26, prohibits the State of California and "any subdivision . . . thereof" from adopting legislation forbidding discrimination in the sale or rental of housing. Thus the State of California—through its Constitution—provides assistance to those who would practice discrimination wherever a local governmental body would otherwise have enacted fair housing legislation and have been supported by a large majority of the voters. Many communities in California may well wish to adopt fair housing legislation notwithstanding the opposition to such legislation in other parts of the State. By adopting Article I, Section 26, the State facilitates race discrimination by owners of residential property within such communities. It is, in other words, one thing for the State to choose not to adopt fair housing legislation on a statewide basis; it is quite another to prevent each local government from passing such legislation. Although we can find no cases squarely on point, this in itself seems to be "state action" on the side of race discrimination.

stantial racial imbalance even where no *de jure* segregation is shown).[8]

Not long ago, the California Supreme Court was able to declare with respect to discrimination in housing:

> "Discrimination on the basis of race or color is contrary to the public policy of the United States *and of this State.*" (*Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 (1962) (Emphasis added.)

As respects California's policy toward housing, that statement simply would no longer be true if Proposition 14 becomes law. It would create a new policy permitting property owners to discriminate against their fellows on racial grounds, and disabling government at all levels within the State from dealing with such discrimination.

B. The State May Not Enshrine the "Right" to Discriminate in Its Constitution Where This Serves to Encourage Citizens to Exercise That "Right".

With the effect of Proposition 14 in mind, we are brought to the ultimate question of whether, if the constitutional "right" of property owners to engage in racial discrimination is created, California will

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[8]For example, without the restraint of Article I, Section 26 it might be determined that, whatever the reach of *Shelley v. Kraemer*, the Courts of California will not lend judicial assistance to a property owner seeking to dispossess a tenant on the ground of race. *Cf. Abstract Investment Co. v. Hutchison, supra*, note 2, where the Court, while reading *Shelley* as barring an unlawful detainer action motivated by racial prejudice, also viewed the landlord's motives as a proper basis for denying him relief as a matter of equity. See 204 Cal.App.2d at 247-249, 250-251.

have departed from that position of neutrality the Equal Protection Clause commands it to maintain. We believe that the Amendment has this effect. Creation of a constitutional "right to discriminate" in the field of housing will inevitably encourage and promote exercise of that "right."

1. The Amendment Guarantees That the Practice of Race Discrimination in Housing Will Not Be Abolished by Governmental Action, and the Development and Use of Property Will Proceed in Reliance Upon This Promise.

Proposition 14 assures the citizens of California that race discrimination may be practiced freely not only today but in the years to come. While no one can state with certainty that the California Constitution will *never* be amended, the economic and political difficulties in securing such an amendment render that action unlikely. Thus, so long as Article I, Section 26 remains the law of California, the State government and local governments will be powerless to deal with the serious problem of discrimination in housing. Citizens will order their conduct in reliance upon this state of affairs. Patterns of housing will develop with the expectation that the practice of discrimination may continue unrestricted in the foreseeable future. For example, citizens wishing to reside in an "all-white" community may forego the conveniences of an urban address and purchase a home in a segregated suburb in the expectation that, without the pressure of fair housing legislation, the segregated character will be preserved. The expectations which will develop in such a community will

serve to create a formidable barrier to any member of a minority group seeking to acquire property in that community. Conversely, the barriers surrounding racial ghettos in the cities of California will be intensified. Private capital—necessary to upgrade the quality of housing and achieve integration—will not be attracted to the ghettos. In short, the complex fabric of commercial and residential life within California will be affected by the creation of an environment in which patterns of discrimination in housing may develop and flourish.

2. By Enshrining the "Right to Discriminate" in California's Constitution, the State Encourages the Exercise of That Right by Altering of the Moral Climate as Respects Discrimination.

Discrimination is encouraged in another, equally significant way. Article I, Section 26 puts the State in the position of condoning race discrimination; it repudiates, in the field of housing at least,[9] California's historic policy opposing race discrimination in the private as well as public sector, including the housing market. *Burks v. Poppy Construction Co.*,

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[9]The accuracy of our description of Proposition 14 as establishing an affirmative State policy sympathetic to race discrimination in housing is in no way diminished by the existence of various statutes forbidding discrimination in other contexts, summarized by Petitioners in an appendix to their brief. (App., pp. 12-14). Except for a few statutes which either restate what the Constitution plainly requires, such as those forbidding the state to discriminate with regard to publicly held property, these statutes do not pertain to the area of real estate and housing. While there is undoubtedly some moral inconsistency in accepting Negroes in a commercial setting (e.g., in employment, see Calif. Labor Code §§ 1410-32) but not in certain residential neighborhoods, that is precisely the posture in which the State finds itself.

supra. In its place the Amendment substitutes a constitutional right to discriminate.

Proposition 14 purports to add a new section to Article I of the Constitution of the State of California. Article I carries the general caption "Declaration of Rights". Safeguarded against legislative interference by Article I are the rights of religious liberty and conscience (Article I, Section 4); the privilege of the Writ of Habeas Corpus (Section 5); the right to bail and the prohibition against cruel and unusual punishment (Section 6); the right to trial by jury (Section 7); the right to counsel (Section 8); freedom of speech and press (Section 9); the right of assembly and to petition for redress of grievances (Section 10); the right to a speedy and public trial (Section 13); the prohibition against double jeopardy (*id.*); the prohibitions against bills of attainder and ex post facto laws (Section 16); and the prohibition against unreasonable searches and seizures (Section 19). Proposition 14 adds a new "right"—the "right" to practice race discrimination.

We submit that the State may not add the right to discriminate to its Bill of Rights and then claim "neutrality" on the subject. Constitutional rights are respected and revered in this country as proof of its highest principles. Article I, Section 26 establishes an *affirmative public policy* in California facilitating discrimination in housing; it would equate the "right to discriminate" with the great rights already enshrined in California's Declaration of Rights. Housing discrimination, no matter how harmful to the

community at large and to the minorities within it, cannot be reproached by legislative, executive, or judicial action. This striking declaration of public policy will inevitably encourage many Californians to exercise their new-found "right". Race discrimination no longer need be practiced in shame in California; it now bears the imprimatur of State approval.

The effect of this elevation of race discrimination to a constitutional right is not diminished by the absence of any reference to race in the Amendment. For there is no question that—as the California Supreme Court found as a fact—Proposition 14 was passed for the principal (if not the sole) purpose of protecting the property owner's privilege of discriminating on grounds of race. Whatever other ends may be attributed to Proposition 14 (and we can think of none which are not fictitious), its core purpose had to do with race discrimination, and it was and is so understood by the public.[10]

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[10]The California Supreme Court found as a fact that Proposition 14 was enacted for the purpose of protecting the privilege of the property owner to discriminate on the basis of race, religion and national origin in the sale or rental of his property:

> "A state enactment cannot be construed without concern for its immediate objective [citations], and for its ultimate effect [citations]. To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. . . ."
>
> [The court then reviewed the historical development of legislation in California respecting race discrimination.]
>
> "Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might

The elevation of the "right" to discriminate to constitutional status is particularly significant in California where respect for the exercise of constitutionally protected rights is cultivated by the State. The State Board of Education, reflecting Mr. Justice

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circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." (64 C.2d, at 533-535).

The California Supreme Court elsewhere stated, in a similar vein:

"[W]e can conceive of no other purpose for an application of Section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist." *(Mulkey v. Reitman,* 64 C.2d, at 544.)

The purpose of Proposition 14—to facilitate race discrimination—was expressly urged upon the voters of California. Indeed, the official ballot argument's guarded language makes clear the purpose to restore the privilege of race discrimination in the disposition or management of real property:

"Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish without interference by State or local government.

"Most owners of property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

. . . . . .

"Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions." (Quoted in Appendix to Brief for Petitioners, pp. 3-4, emphasis added).

This Court cannot be hampered by clever draftsmanship in exercising its role as final arbiter of constitutional disputes. Time and again this Court has found in seemingly neutral legislation a concealed discriminatory condition or purpose. See, e.g., *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Lane v. Wilson,* 307 U.S. 268 (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960).

We suggest that the popular understanding of Proposition 14's purpose and effect was and is precisely what the Court below found it to be. "Its . . . effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?" *Child Labor Tax Case,* 259 U.S. 20, 37 (1922).

Brennan's concern with "the need to place greater emphasis upon individual rights and liberties in the American social studies curriculum" (Brennan, "Breathe Life Into Constitutional Guarantees of Liberty," *Journal of the California Teachers Association,* January, 1965, p. 4) has resolved that:

> "No student should leave our schools without a lively knowledge of the American Constitution, for here are found the main principles of our heritage. Our democracy can be kept strong only by the dedication of every new generation to the discipline of liberty. In knowledge of the Bill of Rights and in loyalty to its propositions rests our faith in the future.
>
> * * * * *
>
> "We believe that teaching in this field no matter how controversial the issue, should be conducted within the framework of free discussion. Not only the history of the Bill of Rights should be taught, but contemporary issues it raises, such as the debate over separation of church and state embodied in the First Amendment, and the privilege against self-incrimination as provided in the Fifth Amendment, should be discussed. Now is the time to help our young people to become aware of the risks, the privileges and the personal demands of freedom." (Resolution of the California Board of Education, October 10, 1963).

The legislature requires that this program of instruction not be confined to the United States Constitution, but that it include the study of the State Constitution as well. (Calif. Education Code § 7901).

Calling on the resources of private groups and educators, California's educational system is a leader in the national movement to inculcate younger citizens in the fundamental principles of constitutionalism.[11] If Proposition 14 became a section of the California Constitution, the "right to discriminate" will become a required subject of instruction in California; students throughout the State will come to view race discrimination as an essential component of a free society.

A striking parallel to the instant case is found in *Anderson v. Martin*, 375 U.S. 399 (1964). There a Louisiana law required designation of the race of all candidates for public office on the ballot. Although the law did not *compel* discrimination, this Court struck it down, declaring that it was *likely* to encourage the voters to cast their ballots on racial grounds. The Court, drawing on its own understanding and experience, did not require statistical data to conclude that the designation of the candidates' race on the ballot would foster discrimination in the voting booth. The kind of encouragement found in *Anderson* is similarly present here. And the disfavor in which the constitution holds racial discrimination, see

[11]See, e.g., McKenney, *Teaching the Bill of Rights in California*, *Saturday Review*, March 19, 1966:

> "California's experiment, however, has moved further than most toward effective teaching in this area. It is unique because it is not being developed in one school district or one university or college, but is the result of the cooperative effort of members of the State Board of Education, university and college educators, classroom teachers, lawyers, and community leaders . . . . [I]f the movement spreads, it will be good for the whole country."

Harper v. Virginia, 383 U.S. 663, 667 (1966), again commands judicial sensitivity to constitutional encouragement of discrimination.

Anderson also provides an opportunity to correct petitioners' misconception about the determination of the Court below that Proposition 14 unconstitutionally authorizes and encourages race discrimination. Petitioners correctly point out that there has been no finding that Proposition 14 *caused* the discriminatory conduct in the case at bar.[12] This, of course, is related to the point raised by Mr. Justice Harlan in *Peterson v. Greenville*, 373 U.S. 244, 252-253 (1963) (separate opinion) and in his dissenting opinion in *Evans v. Newton*, 382 U.S. 296, 316, n. 1 (1966). But this case differs in a critical respect from those cases.

In *Peterson v. Greenville*, the Court reversed the trespass conviction of 10 negroes who had refused to leave a segregated lunch counter after having been denied service on the ground of their race. The basis of reversal was the existence of a local ordinance requiring segregated service in such establishments. Mr. Justice Harlan's difficulty with the Court's opinion lay in the majority's failure to demonstrate a *causal relationship* between the ordinance and the discriminatory conduct of the restaurant owner.

Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), Mr. Justice Harlan rejected Mr. Justice White's approach because there was no showing of

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[12]Such a finding could not have been made in *Mulkey* as the discrimination there occurred prior to the passage of Proposition 14.

causation. There a Georgia statute was seen by Mr. Justice White as facilitating establishing discriminatory provisions in the dedication of a park in trust for the public. The issue was whether a park, so dedicated, could be operated on a segregated basis. Mr. Justice Harlan, though not contending that the state statute was valid, was unable to conclude that its existence infected the dedication of the trust by causing the insertion of the discriminatory provisions.

But these difficulties are simply not present in the instant case. The challenge here is directed toward the *existence* of a state law which authorizes and encourages race discrimination.[13] We do not suggest that, in this respect, the discrimination of petitioners is itself "state action" any more than this Court held in *Anderson* that racially motivated voting is "state action." Indeed, Justice Clark's opinion very carefully disclaims any such holding:

> "At the outset it is well we point out what this case does not involve. It has nothing whatever to do with the right of the citizen to cast his vote for whomever he chooses and for whatever reason he pleases. . . . It has only to do with the right of the State to require or *encourage* its

[13]Respondents, who seek relief under a California statute forbidding discrimination (Unruh Act, Calif. Civ. Code §§ 51-52), therefore have standing to attack the constitutionality of Proposition 14 without providing that it "caused" the discrimination of which they complain. The unconstitutionality of Proposition 14 arises because it will inevitably encourage some owners of property to discriminate. A judgment holding Article I, Section 26 unconstitutional restores the Unruh Act which prohibits discrimination by the owner of commercial real estate regardless of any state participation in the transaction.

voters to discriminate on the grounds of race." (375 U.S. at 402.)

We do not, therefore, focus on private conduct. We do not contend that Proposition 14 "caused" the property owners who are petitioners here to discriminate against respondents. We contend only that Proposition 14 must cause acts of racial discrimination in California which would not take place had the state merely repealed all fair housing legislation. To strike it down would, so far as the Constitution is concerned, permit private property owners to discriminate, but would restore the state to a neutral position by ending state encouragement of such discrimination.

The constitutional principle which we urge follows from the often expressed view that a state may not, by statute, authorize acts of race discrimination. Years ago this Court held that a state may not enact a statute which authorizes private acts of discrimination. *McCabe v. A.T.&S.F. Ry. Co.*, 235 U.S. 151 (1914). In that case this Court concluded that the denial of equal railroad facilities to Negroes by a railroad was unconstitutional state action where authorized by a state statute.

This principle was reiterated by several Justices in *Burton v. Wilmington Park Authority*, 365 U.S. 715 (1961). Mr. Justice Stewart, concurring, read the opinion of the lower Court to have construed state law as:

"authorizing discriminatory classification based exclusively on color. Such a law seems to me

> clearly violative of the Fourteenth Amendment." (*Id.*, at 727).

While unable to read the statute in the same manner, Mr. Justice Frankfurter, dissenting, stated:

> "If my brother [Stewart] is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is undoubtedly a denial by a State of the equal protection of the laws. . . ." (*Id.*, at 727.)

Mr. Justice Harlan, joined in dissent by Mr. Justice Whittaker, also expressed the same view. See *Id.*, at 728.

Mr. Justice White's concurring opinion in *Evans v. Newton*, 382 U.S. 296, 302 (1966) follows similar lines. There Justice White reviewed the legal background against which Senator Bacon drew his will containing provisions for the establishment, in trust, of a racially segregated park. State legislation, adopted six years before execution of the Senator's will, expressly authorized the dedication of parks to be operated on a segregated basis. Because the statute was permissive only, Justice White concluded that "the State cannot be said to have coerced private discrimination" *Id.*, at 306. But, Justice White added, the statute clarified certain legal doubts smoothing the way for the dedication in trust of a segregated park, and thereby implicated the state in the discrim-

ination reflected in the trust created pursuant to this statute.[14]

Concededly, Justice White's opinion placed some emphasis on an aspect of the Georgia law for which there is no parallel here. Georgia had removed certain legal obstacles to creating *racial* limitations in the dedication of public parks while leaving unaffected the barriers to creating other kinds of limitations. Thus, it might be argued that Georgia singled out race discrimination for special treatment.

Any distinction between *Evans* and the instant cases in this respect is, we submit, superficial. Despite its neutral language, Proposition 14 is in fact directed toward *racial* discrimination and no other.[15] The vice of the Georgia statute with which Justice White dealt in *Evans* was that it tended to encourage race discrimination by those dedicating parks to the public. The singling out of *racial* restrictions by the Georgia legislature made certain the State's approval

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[14]The opinion of the Court expressly states that the majority did not reach the questions posed by Mr. Justice White. 382 U.S. at 300, n. 3.

Mr. Justice Black dissented on the ground that the issue of the trust's validity was not before the Court. 382 U.S. at 312-315.

Mr. Justice Harlan, joined by Mr. Justice Stewart in dissent, rejected the approach of Justice White because, *inter alia*, there was no showing in the record that Senator Bacon would have acted otherwise but for the statute. 382 U.S. at 316, n. 1. We have discussed this causation problem above and shown that that difficulty is not present here. The constitutional challenge in these cases is directed against the existence of a State enactment authorizing and encouraging race discrimination. Thus these cases are in the posture as *Evans v. Newton* would have been had it arisen as a suit for a declaratory judgment invalidating the Georgia legislation authorizing dedication of segregated parks.

[15]See note 10, supra.

of such restrictions; the greater sophistication of Proposition 14's draftsmen which resulted in its superficially "neutral" language is matched by the considerable sophistication of the public. The California citizenry understood the meaning of Proposition 14 which, no less than the Georgia statute in *Evans*, would place the State on the side of race discrimination.

CONCLUSION

Proposition 14 assists and encourages race discrimination in several respects. It has disabled the local governmental bodies within the State from dealing with the problem of race discrimination in the residential housing market. It precludes the legislature from dealing with (and, presumably, even investigating) the problem of racial barriers to housing, It forbids executive action in this field. And it bars California courts from developing common law principles respecting the right to obtain housing irrespective of race. The effect of these radical innovations in the law of California is to establish a climate in which the perpetuation and development of racial barriers can prosper. Public and private affairs—the location of schools and parks, the acquisition of property, the planning and development of real estate developments—all can proceed with greater assurance that segregated housing patterns can be maintained. All aspects of state and local government are powerless to act to alter these conditions. Finally, it en-

shrines the "right to discriminate" in California's Constitution, thereby lending the State's stamp of approval to the exercise of this newly created "right".

For these reasons, we urge that the judgments of the California Supreme Court in both *Mulkey v. Reitman* and *Prendergast v. Snyder* be affirmed.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,

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Staff Counsel, American Civil Liberties Union
of Northern California,
Attorney for Amicus Curiae.

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SUPREME COURT.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, et al.,
Petitioners,
vs.
LINCOLN W. MULKEY, et al.,
Respondents.

CLARENCE SNYDER,
Petitioner,
vs.
WILFRED J. PRENDERGAST, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF, AMICUS CURIAE and BRIEF OF THE CALIFORNIA DEMOCRATIC STATE CENTRAL COMMITTEE, AMICUS CURIAE

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On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The California State Central Committee of the Democratic Party hereby respectfully moves for leave

to file a brief *amicus curiae* in this case in support of respondents, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the respondents has been obtained. The consent of the attorneys for the petitioners was requested but refused.

The California State Central Committee of the Democratic Party is the official Democratic Party organization in the State of California. (California Elections Code, Division 6, Chapter 2.) The Democratic Party by platform and practice is committed to the protection and enhancement of the civil rights of all and is dedicated to the principle that the people through their constituted agencies should take appropriate steps to insure that those rights at all times remain meaningful and significant.

Amicus filed an *amicus curiae* brief in *Lewis v. Jordan,* (California Supreme Ct., Sac. No. 7549), in support of a petition seeking to prohibit the inclusion on the election ballot of Proposition 14, the same Proposition whose constitutionality is here at issue. *Amicus* believes that the Court should be cognizant of the impact of Proposition 14 on California and its citizens and for that reason seeks leave to present certain arguments and policy considerations in a more generic fashion than have been presented by the parties in these cases. We believe that our contribution should assist the Court in its consideration of the broader aspects of this litigation and of the con-

sequences its decision will have on race relations in California and throughout the nation.

Dated, San Francisco, California,
March 7, 1967.

Respectfully submitted,
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ROSS E. STROMBERG,
HANSON, BRIDGETT, MARCUS & JENKINS,
Of Counsel.

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On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE CALIFORNIA DEMOCRATIC STATE CENTRAL COMMITTEE AS AMICUS CURIAE

INTEREST OF AMICUS

Amicus is the California State Central Committee of the Democratic Party. Under California law it is it's official representative body.

The Democratic Party of California is deeply committed to the principle that each man should have equal opportunity to fulfill his own potential; that this opportunity should not be denied or limited because of his political or religious beliefs or national origin or the color of his skin.

The Democratic Party of California has continuously worked at all levels of government—local, regional, state and national—to achieve this goal. It has consistently sponsored legislation through its elected representatives to eliminate such discrimination and to promote the brotherhood of all men. It is deeply troubled by the strategem employed in the state initiative here involved because it would weave racial segregation in housing into the legal framework of our state.

In appearing here, Amicus is representing and expressing the concern of its membership consisting of persons of all races, creeds, colors and of many different countries of national origin, and in furtherance of its efforts to promote a fair and just society in which all men can strive—with equal chance for success—for life, liberty and happiness.

ARGUMENT

Proposition 14, which if declared legal would become Section 26 of Article I of the California Constitution, provides in its operative part:

> ". . . Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, di-

> rectly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease, or rent such property to such person or persons as he, in his absolute discretion, chooses."[1]

Although carefully drawn so as to appear nondiscriminatory on its face and dressed in the appealing and bland lamb's clothing of freedom of property, the obvious purpose of Proposition 14 was to foster discrimination in the sale or rental of housing, and provide an environment in which such discrimination would operate unimpeded by any governmental resolution. Proposition 14 was launched in the wake of the enactment of certain statutes regulating discrimination in housing, particularly the Rumford Fair Housing Act. (*California Health and Safety Code,* § 35700, et seq.) The official ballot argument in favor of Proposition 14 referred specifically to the Rumford Act and its prohibition of the refusal to sell or rent property because of race, color, religion, national origin or ancestry. As stated below by the California Supreme Court:

> "Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circum-

[1]Also by express definition such absolute discretion is not limited to private individuals but also extends to "partnerships, corporations, and other legal entities and their agents or representatives" except the state or its subdivisions. Nor is Proposition 14 limited to single-family dwellings; all "residential real property" is affected regardless of the size or the number of units involved.

scribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." [*Mulkey v. Reitman*, 64 C.2d 529, 534-5, 50 Cal.Rptr. 881, 413 P.2d 825 (1966).]

Although petitioners have sought to defend Proposition 14, as a simple restoration of the *status quo ante* equivalent to a legislative decision to repeal legislation, it is manifest that the proposition in effect goes far beyond the repeal of the California Fair Housing legislation. It provides for virtually a total sterilization of the state and local governmental entities in the area of housing segregation. Its prohibition of interference with private discrimination does not relate to two or three specific legislative enactments alone, but rather sweeps within its ambit of prohibition the legislative, judicial and executive branches and administrative agencies at the state level, as well as all state agencies and subdivisions. It effectively eliminates any power—legislative, executive or judicial—of the State government or local governments of California to directly work toward the elimination of discriminatory housing in California.

The effect of Proposition 14 is, therefore, a strong reinforcement to the continuation of segregated housing in California. Beyond the initial impact on the maintenance of ghetto housing, Proposition 14 in turn affects those areas related to segregation in housing. By helping to maintain segregated housing, it limits efforts to ameliorate "de facto" segregation in primary and secondary public schools. Racial imbalance

in schools is maintained by the continuation of imbalance in housing.

In addition, employment opportunities of minority group members are limited by an inability to secure housing away from the core area of cities and in areas where potential jobs exist, thereby compounding the difficulties of Negroes and other minorities in securing employment. Opportunities already narrowed by educational limitations or outright discrimination are narrowed still further by inaccessibility.

Beyond the effect on educational and job opportunities for the minority group members, segregated housing most certainly affects the individual discriminated against in terms of his or her view of himself and his attitude towards the society in which he lives. This Court noted this in *Brown v. Board of Education,* 347 U.S. 483 (1953) where, in describing the effect of school segregation on the Negro child, Chief Justice Warren stated:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (At p. 494.)[2]

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[2]Compare the similarly expressed concern of the Supreme Court of the State of California:

> "So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior." *Jackson v. Pasadena City School District,* 59 Cal. 2d 876 at 881, 382 P 2d 878 (1963).

Segregation in housing condemns many minority group members to living in overcrowded ghettos, with the concomitant conditions of inadequate, unhealthy and often unsafe living conditions.[3] By the fact of segregation as well as the conditions in which he is forced by segregation to live, the minority group member bears the "badge of servitude" or the burden of second-class citizenship. As a result, debilitating feelings of inferiority or futility may be generated on the one hand, or, on the other, the individual may view himself as surrounded by a hostile society and react in an anti-social manner. The not unexpected consequences from the feelings of futility on the part of the individual or his hostility to and rejection of the society which discriminates against him, is the resort to crime or generalized rioting. As stated by the California Supreme Court:

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[3]Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 Calif. Law Rev. 1, 28-30 (1964) wherein the author states that the denial of access to housing is no less significant than the injuries to the discriminatees in the voting, transportation, hospital, and restaurant in state-owned premises cases. This Court is aware of the stifling effect of housing discrimination on the health and wellbeing of individuals. In *Berman v. Parker*, 348 U.S. 26, 32-33 (1954), where the taking of property by eminent domain to eliminate and prevent substandard housing conditions pursuant to the District of Columbia Redevelopment Act of 1945 was found constitutional, Mr. Justice Douglas, speaking for the court, stated:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river."

Yet petitioners would have this Court say that discrimination in housing deserves constitutional protection.

> "Discrimination in housing leads to lack of adequate housing for minority groups . . . , and inadequate housing conditions contribute to disease, crime and immorality." [*Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 471, 20 Cal. Rptr. 609, 370 P. 2d 313 (1962).]

The effect of Proposition 14 is not limited, however, to the sterilization of the state and its subdivisions in the area of segregated housing nor to the debilitation of any attack on this root cause of other problem areas of minority group members. Rather the proposition, in addition, places the seal of approval of the State of California on discrimination in housing. It is, in purpose and in effect, a constitutional guarantee of the right to discriminate in the sale or rental of housing. It is, further, the provision of the means and, in fact, an open invitation to and endorsement of discrimination in housing.[4]

An analogous situation was presented to this Court in *Anderson v. Martin*, 375 U.S. 399 (1967). There, the State of Louisiana required the Secretary of State of Louisiana to print on all ballots the race of each candidate running for office. The Court struck down the Louisiana statute because the State was furnishing the vehicle for the operation of racial prejudice

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[4]The question here, of course, goes beyond the issue of housing segregation in California. Should this Court sustain Proposition 14, it will be an open invitation to other states to enact similar provisions. Also, given the impetus of such a decision, what is to prevent others in California or elsewhere from launching high-priced, well-publicized initiative campaigns to impart constitutional dignity to similar covert schemes, such as to the "right" of absolute discretion in hiring or firing employees, thereby repealing existing fair employment statutes.

and by so doing, in light of existing "private attitudes and pressures", was encouraging the voters to discriminate on the basis of color.

In like manner, Proposition 14, given the context of "private attitudes and pressures" with regard to minority housing and the existing legislation, constitutes the provision of a vehicle for the operation of private discrimination; moreover, by enshrining the right to discriminate in the State's Constitution it provides sanction for and encouragement of discrimination in housing by the State of California.

The right to acquire, own, and dispose of property free from discrimination stands among those rights protected by the Fourteenth Amendment.

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that amendment as an essential precondition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee." *Shelley v. Kraemer,* 334 U.S. 1, at 10 (1948).

Petitioners would have this Court emasculate this right and subordinate it and other civil rights to the ill-disguised right to discriminate envisioned by Proposition 14.

CONCLUSION

The Democratic State Central Committee does not contend that the Rumford Fair Housing Act and other California legislation relative to discrimination in housing cannot be amended or modified. Proposition 14, as already indicated, goes beyond modification or even repeal of California's Fair Housing legislation; it provides for the total removal of the State of California and all its subdivisions from the area of discrimination in housing. By so doing, California is not only prevented from any activities in this area, but is by this limitation, debilitated in its ability to work on other minority group problems.

In addition, the Democratic State Central Committee believes that Proposition 14, providing the vehicle for discrimination and by encouraging discrimination by the providing of a constitutional right to discriminate, is state action in violation of the 14th Amendment of the U. S. Constitution.

Dated, San Francisco, California,
March 7, 1967.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES

No. 483.—October Term, 1966.

Neil Reitman et al., Petitioners, v. Lincoln W. Mulkey et al. | On Writ of Certiorari to the Supreme Court of California.

[May 29, 1967.]

Mr. Justice White delivered the opinion of the Court.

The question here is whether Art. I, § 26 of the California Constitution denies "to any person . . . the equal protection of the laws" within the meaning of the Fourteenth Amendment of the Constitution of the United States.[1] *Section 26 of Art. I, an initiated measure submitted to the people as Proposition 14 in a statewide ballot in 1964, provides in part as follows:*

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."[2]

The real property covered by § 26 is limited to residential property and contains an exception for state-owned real estate.[2]

[1] Section 1 of the Fourteenth Amendment provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] The following is the full text of § 26: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to

The issue arose in two separate actions in the California courts, *Reitman* v. *Mulkey* and *Snyder v. Prendergast*. In *Reitman*, the Mulkeys, who are husband and wife and respondents here, sued under § 51 and § 52 of the California Civil Code [3] alleging that petitioners had re-

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sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." (Cal. Const., Art. I, § 26.)

[3] Cal. Civil Code §§ 51 and 52 provide in part as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

. . . . .

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

fused to rent them an apartment solely on account of their race. An injunction and damages were demanded. Petitioners moved for summary judgment on the ground that §§ 51 and 52, insofar as they were the basis for the Mulkeys' action, had been rendered null and void by the adoption of Propostion 14 after the filing of the complaint. The trial court granted the motion and respondents took the case to the California Supreme Court.

In the *Prendergast* case, respondents, husband and wife, filed suit in December 1964 seeking to enjoin eviction from their apartment; respondents alleged that the eviction was motivated by racial prejudice and therefore would violate § 51 and § 52 of the Civil Code. Petitioner Snyder cross-complained for a judicial declaration that he was entitled to terminate the month-to-month tenancy even if his action was based on racial considerations. In denying petitioner's motion for summary judgment, the trial court found it unnecessary to consider the validity of Proposition 14 because it concluded that judicial enforcement of an eviction based on racial grounds would in any event violate the Equal Protection Clause of the United States Constitution.[4] The cross-complaint was dismissed with prejudice [5] and petitioner Snyder appealed to the California Supreme Court which considered the case along with *Reitman* v. *Mulkey*. That court, in reversing the *Reitman* case, held that Art. I, § 26, was invalid as denying the equal protection of the laws guaranteed by the Fourteenth Amendment. 64 Cal. 2d

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[4] The trial court considered the case to be controlled by *Abstract Investment Co.* v. *Hutchinson*, 204 Cal. App. 2d 242, which in turn placed major reliance on *Shelley v. Kraemer*, 334 U. S. 1, and *Barrows* v. *Jackson*, 346 U. S. 249.

[5] Respondents' complaint was dismissed without prejudice based on the trial court's finding that petitioner would not seek eviction without the declaratory relief he had requested.

529, 413 P. 2d 825. For similar reasons, the court affirmed the judgment in the *Prendergast* case. 64 Cal. 2d 877, 413 P. 2d 847. We granted certiorari because the cases involve an important issue arising under the Fourteenth Amendment. 385 U. S. 967.

We affirm the judgment of the California Supreme Court. We first turn to the opinion of that court, which quite properly undertook to examine the constitutionality of § 26 in terms of its "immediate objective," its "ultimate impact" and its "historical context and conditions existing prior to its enactment." Judgments such as these we have frequently undertaken ourselves. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *McCabe* v. *Atchison, Topeka & Sante Fe Railway*, 235 U. S. 151; *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; *Turner* v. *City of Memphis*, 369 U. S. 350; *Anderson* v. *Martin*, 375 U. S. 399. But here the California Supreme Court has addressed itself to these matters and we should give careful consideration to its views because they concern the purpose, scope, and operative effect of a provision of the California Constitution.

First, the court considered whether § 26 was concerned at all with private discriminations in residential housing. This involved a review of past efforts by the California Legislature to regulate such discriminations. The Unruh Act, Civ. Code §§ 51–52, on which respondents based their cases, was passed in 1959.[6] The Hawkins Act, formerly Health & Saf. Code §§ 35700–35741, followed and prohibited discriminations in publicly assisted housing. In 1961, the legislature enacted proscriptions against restrictive covenants. Finally, in 1963, came the Rumford Fair Housing Act, Health & Saf. Code §§ 35700–35744, superseding the Hawkins Act and prohibiting racial discriminations in the sale or rental of any

[6] See note 2, *supra*.

private dwelling containing more than four units. That act was enforceable by the State Fair Employment Practice Commission.

It was against this background that Proposition 14 was enacted. Its immediate design and intent, the California court said, was "to overturn state laws that bore on the right of private sellers and lessors to discriminate," the Unruh and Rumford Acts, and "to forestall future state action that might circumscribe this right." This aim was successfully achieved: the adoption of Proposition 14 "generally nullifies both the Rumford and Unruh Acts as they apply to the housing market," and establishes "a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment should state action be involved."

Second, the court conceded that the State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them. But, because a significant state involvement in private discriminations could amount to unconstitutional state action, *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market. Its conclusion was that it did.

To reach this result, the state court examined certain prior decisions in this Court in which discriminatory state action was identified. Based on these cases, *Robinson* v. *Florida,* 378 U. S. 153, 156; *Anderson* v. *Martin,* 375 U. S. 399; *Barrows* v. *Jackson,* 346 U. S. 249, 254; *McCabe* v. *Atchison, Topeka & Santa Fe Railway,* 235 U. S. 151, it concluded that a prohibited state involvement could be found "even where the State can be charged only with encouraging, rather than commanding discrimination . . . ." Also of particular interest to the

court was MR. JUSTICE STEWART's concurrence in *Burton v. Wilmington Parking Authority*, 365 U. S. 715, where it was said that the Delaware courts had construed an existing Delaware statute as "authorizing" racial discrimination in restaurants and that the statute was therefore invalid. To the California court "the instant case presents an undeniably analogous situation" wherein the State had taken affirmative action designed to make private discriminations legally possible. Section 26 was said to have changed the situation from one in which discriminatory practices were restricted "to one where it is encouraged, within the meaning of the cited decisions"; § 26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination . . . ." The court could "conceive of no other purpose for an application of § 26 aside from authorizing the perpetration of a purported private discrimination . . . ." The judgment of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.

There is no sound reason for rejecting this judgment. Petitioners contend that the California court has misconstrued the Fourteenth Amendment since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to "authorize" and "encourage" discrimination because it makes legally permissible that which was formerly proscribed. But as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with

respect to private discriminations. What the court below did was first to reject the notion that the State was required to have a statute prohibiting racial discriminations in housing. Second, it held the purpose and intent of § 26 was to authorize private racial discriminations in the housing market, to repeal the Unruh and Rumford Acts and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with § 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of § 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

The California court could very reasonably conclude that § 26 would and did have wider impact than a mere repeal of existing statutes. Section 26 mentioned neither the Unruh nor Rumford Acts in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby *pro tanto* repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations and other legal

entities, as well as their agents and representatives, could now discriminate with respect to their residential real property, which is defined as any interest in real property of any kind or quality, "irrespective of how obtained or financed," and seemingly irrespective of the relationship of the State to such interests in real property. Only the State is excluded with respect to property owned by it.[2]

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[2] In addition to the cases we now have before us, two other cases decided the same day by the California Supreme Court are instructive concerning the range and impact of Art. I, § 26, of the California Constitution. In *Hill* v. *Miller*, 413 P. 2d 852, on rehearing, 415 P. 2d 33, a Negro tenant sued to restrain an eviction from a leased, single-family dwelling. The notice to quit served by the owner had expressly recited: "The sole reason for this notice is that I have elected to exercise the right conferred upon me by Article I Section 26, California Constitution, to rent said premises to members of the Caucasian race." Although the California court had invalidated § 26, the court ruled against the Negro plaintiff because the Unruh Act did not cover single-family dwellings. Thus the landlord's reliance on § 26 was superfluous.

In *Peyton* v. *Barrington Plaza Corp.*, 413 P. 2d 849, a Negro physician sued to require the defendant corporation to lease him an apartment in Barrington Plaza which was described in the opinion as follows:

"that defendant received a $17,000,000, low interest rate loan under the National Housing Act to construct Barrington Plaza; that such sum represents 90% of the construction costs of the plaza; that the development is a part of the urban redevelopment program undertaken by the City of Los Angeles; that Barrington Plaza is the largest apartment development in the western United States, providing apartment living for 2,500 people; that it includes many retail shops and professional services within its self-contained facilities; that it provides a fall-out shelter, completely stocked by the federal government with emergency supplies; that the plaza replaced private homes of both Caucasians and non-Caucasians; that the city effected zoning changes to accommodate the development; that the defendant's securities were sold, its construction contracts were let, its building permits were issued and its shops and professional

This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting the facts and weighing the circumstances" on a case-to-case basis can a "non-obvious involvement of the State be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722. Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court.

The assessment of § 26 by the California court is similar to what this Court has done in appraising state statutes or other official actions in other contexts. In *McCabe* v. *Atchison, Topeka & Santa Fe Railway*, 235 U. S. 151, the Court dealt with a statute which, as construed by the Court, authorized carriers to provide cars for white persons but not for Negroes. Though dismissal of the complaint on a procedural ground was affirmed, the Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be "acting in the matter under the authority of state law." This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to

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services established all pursuant to state or local approval, cooperation and authority."

The defendant defended the action and moved for judgment on the pleadings based on Art. I, § 26, of the California Constitution. The motion was granted but the judgment was reversed based on the decision in *Reitman* v. *Mulkey*.

violate the Fourteenth Amendment in the context of that case. Similarly, in *Nixon* v. *Condon*, 286 U. S. 73,[8] the Court was faced with a statute empowering the executive committee of a political party to prescribe the qualifications of its members for voting or for other participation, but containing no directions with respect to the exercise of that power. This was authority which the committee otherwise might not have had and which was used by the committee to bar Negroes from voting in primary elections. Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association; the exercise of the power was viewed as an expression of state authority contrary to the Fourteenth Amendment.

In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the operator-lessee of a restaurant located in a building owned by the State and otherwise operated for public purposes, refused service to Negroes. Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.

In *Peterson* v. *Greenville*, 373 U. S. 244, and in *Robinson* v. *Florida*, 378 U. S. 153, the Court dealt with state statutes or regulations requiring, at least in some respects, segregation in facilities and services in restaurants. These official provisions, although obviously unconstitutional and unenforceable, were deemed in themselves sufficient to disentitle the State to punish, as trespassers, Negroes who had been refused service in the restaurants.

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[8] This case was a sequel to *Nixon* v. *Herndon*, 273 U. S. 536, which outlawed statutory disqualification of Negroes from voting in primary elections.

In neither case was any proof required that the restaurant owner had actually been influenced by the state statute or regulation. Finally, in *Lombard* v. *Louisiana*, 373 U. S. 273, the Court interpreted public statements by New Orleans city officials as announcing that the city would not permit Negroes to seek desegregated service in restaurants. Because the statements were deemed to have as much coercive potential as the ordinance in the *Peterson* case, the Court treated the city as though it had actually adopted an ordinance forbidding desegregated service in public restaurants.

None of these cases squarely controls the case we now have before us. But they do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that this judgment should be overturned.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 483.—October Term, 1966.

Neil Reitman et al., Petitioners, v. Lincoln W. Mulkey et al. | On Writ of Certiorari to the Supreme Court of California.

[May 29, 1967.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I add a word to indicate the dimensions of our problem.

This is not a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell it to whomsoever he pleases, excluding all others whether they be Negro, Chinese, Japanese, Russians, Catholics, Baptists, or those with blue eyes. We deal here with a problem in the realm of zoning, similar to the one we had in *Shelley* v. *Kraemer*, 334 U. S. 1, where we struck down restrictive covenants.

Those covenants are one device whereby a neighborhood is kept "white" or "Caucasian" as the dominant interests desire. Proposition 14 in the setting of our modern housing problem is only another device of the same character.

Real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities.[1] Realtors commonly believe it is unethical to sell or rent to a Negro in a predominantly or all-white neighborhood,[2] and mortgage lenders throw their weight alongside segregated communities, rejecting applications by a member of a minority group who tries to break the white phalanx save and unless the neighborhood is in process of conversion into a mixed or a Negro com-

[1] Civil Rights USA, Housing in Washington, D. C.; United States Commission on Civil Rights (1962), pp. 12–15.

[2] *Id.*, 12–13.

munity.[3] We are told by the Commission on Civil Rights:

> "Property owners' prejudices are reflected, magnified, and sometimes even induced by real estate brokers, through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogeneous' neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin.[4]
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> "The financial community, upon which mortgage financing—and hence the bulk of home purchasing and home building—depends, also acts to a large extent on the premise that only a homogeneous neighborhood can offer an economically sound investment. For this reason, plus the fear of offending their other clients, many mortgage-lending institutions refuse to provide home financing for houses in a 'mixed' neighborhood. The persistent stereotypes of certain minority groups as poor credit risks also block the flow of credit, although these stereotypes have often been proved unjustified." Housing, U. S. Commission on Civil Rights (1961), pp. 2–3.

The builders join in the same scheme: [5]

> ". . . private builders often adopt what they believe are the views of those to whom they expect

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[3] *Id.*, 14–15.

[4] As the Hannah Commission said:

"Area housing patterns are sharply defined along racial lines. Most members of the housing industry appear to respect them. Although it is unlikely that these patterns are determined by formal agreement, it is probable that they are maintained by tacit understandings." *Id.*, 15.

[5] Housing, U. S. Commission on Civil Rights (1961), p. 3.

> to sell and of the banks upon whose credit their own operations depend. In short, as the Commission on Race and Housing has concluded, 'it is the real estate brokers, builders, and mortgage finance institutions, which translate prejudice into discriminatory action.' Thus, at every level of the private housing market members of minority groups meet mutually reinforcing and often unbreakable barriers of rejection."

Proposition 14 is a form of sophisticated discrimination [6] whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions [7] allow their government to do.

George A. McGanse, chairman of the legislative committee of the Texas Real Estate Association, while giving his views on Title IV of the proposed Civil Rights Act of 1966 (H. R. 14765), which would prohibit discrimination in housing by property owners, real estate brokers, and others engaged in the sale, rental or financing of housing, stated that he warned groups to which he spoke of "the grave dangers inherent in any type of legislation that would erode away the rights that go with the ownership of property." [8] He pointed out that

> "[E]ach time we citizens of this country lose any of the rights that go with the ownership of property, we are moving that much closer to a centralized government in which ultimately the right to own property would be denied." [9]

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[6] Freedom to the Free, Century of Emancipation, Report to the President of the United States Commission on Civil Rights (1963), p. 96.

[7] *City of Richmond* v. *Deares*, 281 U. S. 704.

[8] Hearings before Subcommittee No. 5 of the House Judiciary Committee, 89th Cong., 2d Sess., 1639 (1966).

[9] *Ibid.*

That apparently is a common view. It overlooks several things. First, the right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be. Second, the agencies that are zoning the cities along racial lines are state licensees.

Zoning is a state and municipal function. See *Euclid* v. *Ambler Co.*, 272 U. S. 365, 389 *et seq.*; *Berman* v. *Parker*, 348 U. S. 26, 34–35. When the State leaves that function to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. The present case is therefore kin to *Terry* v. *Adams*, 345 U. S. 461, 466, where a State allowed a private group (known as the Jaybird Association, which was the dominant political group in county elections) to perform an electoral function in derogation of the rights of Negroes under the Fifteenth Amendment.

Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which *Shelley* v. *Kraemer*, *supra*, can be construed. For as said by MR. JUSTICE BLACK in *Bell* v. *Maryland*, 378 U. S. 226, 329 (dissenting), restrictive covenants "constituted a restraint on alienation of property; sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State."

Under California law no person may "engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this State without first obtaining a real estate license." West Calif. Code Ann. § 10130. These licensees are designated to serve the public. Their licenses are not restricted, and could not be restricted, to effectuate a policy of segregation. That would be state action that is barred by the Fourteenth Amendment. There is no difference, as I see it, between a State authorizing a licensee to practice racial discrimination and a State without any express authorization of that kind nevertheless launching and countenancing the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the State is impliedly sanctioning what it may not do specifically.

If we were in a domain exclusively private, we would have different problems. But urban housing is in the public domain as evidenced not only by the zoning problems presented but by the vast schemes of public financing with which the States and the Nation have been extensively involved in recent years. Urban housing is clearly marked with the public interest. Urban housing, like restaurants, inns, and carriers (*Bell* v. *Maryland*, 378 U. S. 226, 253–255, concurring opinion), or like telephone companies, drugstores, or hospitals, is affected with a public interest in the historic and classical sense. See *Lombard* v. *Louisiana*, 373 U. S. 267, 275–278.

I repeat what was stated by Holt, CJ., in *Lane* v. *Cotton*, 12 Mod. 473, 484 (1701):

> "[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and com-

> prehension of such an office, under pain of an action against him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier."

Since the real estate brokerage business is one that can be and is state regulated and since it is state licensed, it must be dedicated, like the telephone companies and the carriers and the hotels and motels, to the requirements of service to all without discrimination—a standard that in its modern setting is conditioned by the demands of the Equal Protection Clause of the Fourteenth Amendment.

And to those who say that Proposition 14 represents the will of the people of California, one can only reply:

> "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . ." V Writings of James Madison (Hunt ed. 1904), p. 272.

SUPREME COURT OF THE UNITED STATES

No. 483.—October Term, 1966.

Neil Reitman et al., Petitioners, v. Lincoln W. Mulkey et al. | On Writ of Certiorari to the Supreme Court of California.

[May 29, 1967.]

Mr. Justice Harlan, whom Mr. Justice Black, Mr. Justice Clark, and Mr. Justice Stewart join, dissenting.

I consider that this decision, which cuts deeply into state political processes, is supported neither by anything "found" by the Supreme Court of California nor by any of our past cases decided under the Fourteenth Amendment. In my view today's holding, salutary as its result may appear at first blush, may in the long run actually serve to handicap progress in the extremely difficult field of racial concerns. I must respectfully dissent.

The facts of this case are simple and undisputed. The legislature of the State of California has in the last decade enacted a number of statutes restricting the right of private landowners to discriminate on the basis of such factors as race in the sale or rental of property. These laws aroused considerable opposition, causing certain groups to organize themselves and to take advantage of procedures embodied in the California Constitution permitting a "proposition" to be presented to the voters for a constitutional amendment. "Proposition 14" was thus put before the electorate in the 1964 election and was adopted by a vote of 4,526,460 to 2,395,747. The Amendment, Art. I, § 26, of the State Constitution, reads in relevant part as follows:

> "Neither the State nor any subdivision nor agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or

desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." [1]

I am wholly at loss to understand how this straightforward effectuation of a change in the California constitution can be deemed a violation of the Fourteenth Amendment, thus rendering § 26 void and petitioners' refusal to rent their property to respondents, because of their race, illegal under prior state law. The Equal Protection Clause of the Fourteenth Amendment, which forbids a State to use its authority to foster discrimination based on such factors as race, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410; *Brown* v. *Board of Education*, 347 U. S. 483; *Gross* v. *Board of Education*, 373 U. S. 683, does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded, *The Civil Rights Cases*, 109 U. S. 3. By the same token, the Fourteenth Amendment does not require of States the passage of laws preventing such private discrimination, although it does not of course disable them from enacting such legislation if they wish.

In the case at hand California, acting through the initiative and referendum, has decided to remain "neutral" in the realm of private discrimination affecting the sale or rental of private residential property; in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a

[1] "Real Property" is defined by § 26 as "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other."

pro tanto repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination.

I do not think the Court's opinion really denies any of these fundamental constitutional propositions. Rather it attempts to escape them by resorting to arguments which appear to me to be entirely ill-founded.

I.

The Court attempts to fit § 26 within the coverage of the Equal Protection Clause by characterizing it as in effect an affirmative call to residents of California to discriminate. The main difficulty with this viewpoint is that it depends upon a characterization of § 26 that cannot fairly be made. The provision is neutral on its face, and it is only by in effect asserting that this requirement of passive official neutrality is camouflage that the Court is able to reach its conclusion. In depicting the provision as tantamount to active state encouragement of discrimination the Court essentially relies on the fact that the California Supreme Court so concluded. It is said that the findings of the highest court of California as to the meaning and impact of the enactment are entitled to great weight. I agree of course, that *findings of fact* by a state court should be given great weight, but this familiar proposition hardly aids the Court's holding in this case.

There is no disagreement whatever but that § 26 was meant to nullify California's fair-housing legislation and thus to remove from private residential property transactions the state-created impediment upon freedom of choice. There were no disputed issues of fact at all, and indeed the California Supreme Court noted at the outset of its opinion that "in the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations." 64 Cal. 2d 529, 531–532, 413 P. 2d 825, 827. There was no finding, for example, that the defendants' actions were anything but the product of their own private choice. Indeed, since the alleged racial discrimination that forms the basis for the *Reitman* refusal to rent on racial grounds occurred in 1963, it is not possible to contend that § 26 in any way influenced this particular act. There were no findings as to the general effect of § 26. The Court declares that the California court "held the purpose and intent of § 26 was to authorize private racial discriminations in the housing market . . . ," *ante*, p. 7, but there is no supporting fact in the record for this characterization. Moreover, the grounds which prompt legislators or state voters to repeal a law do not determine its constitutional validity. That question is decided by what the law does, not by what those who voted for it wanted it to do, and it must not be forgotten that the Fourteenth Amendment does not compel a State to put or keep any particular law about race on its books. The Amendment forbids only a State to pass or keep in effect laws discriminating on account of race. California has not done this.

A state enactment, particularly one that is simply permissive of private decision-making rather than coercive and one that has been adopted in this most democratic of processes, should not be struck down by the

judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect. The only "factual" matter relied on by the majority of the California Supreme Court was the context in which Proposition 14 was adopted, namely, that several strong antidiscrimination acts had been passed by the legislature and opposed by many of those who successfully led the movement for adoption of Proposition 14 by popular referendum. These circumstances, and these alone, the California court held, made § 26 unlawful under this Court's cases interpreting the Equal Protection Clause. This, of course, is nothing but a legal conclusion as to federal constitutional law, the California Supreme Court not having relied in any way upon the State Constitution. Accepting all the suppositions under which the state court acted, I cannot see that its conclusion is entitled to any special weight in the discharge of our own responsibilities. Put in another way, I cannot transform the California court's conclusion of law into a finding of fact that the State through the adoption of § 26 is actively promoting racial discrimination. It seems to me manifest that the state court decision rested entirely on what that court conceived to be the compulsion of the Fourteenth Amendment, not on any fact-finding by the state courts.

II.

There is no question that the adoption of § 26, repealing the former state antidiscrimination laws and prohibiting the enactment of such state laws in the future, constituted "state action" within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws. As a starting point, it is clear that any statute requiring unjustified discriminatory treatment is unconstitutional. *E. g., Nixon* v. *Herndon,*

273 U. S. 536; *Brown* v. *Board of Education, supra; Peterson* v. *City of Greenville,* 373 U. S. 244. And it is no less clear that the Equal Protection Clause bars as well discriminatory governmental administration of a statute fair on its face. *E. g., Yick Wo* v. *Hopkins,* 118 U. S. 356. This case fits within neither of these two categories: Section 26 is by its terms inoffensive, and its provisions require no affirmative governmental enforcement of any sort. A third category of equal protection cases, concededly more difficult to characterize, stands for the proposition that when governmental involvement in private discrimination reaches a level at which the State can be held responsible for the specific act of private discrimination, the strictures of the Fourteenth Amendment come into play. In dealing with this class of cases, the inquiry has been framed as whether the State has become "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 725.

Given these latter contours of the equal protection doctrine, the assessment of particular cases is often troublesome, as the Court itself acknowleges. *Ante,* p. 9. However, the present case does not seem to me even to approach those peripheral situations in which the question of state involvement gives rise to difficulties. See, *e. g., Evans* v. *Newton,* 382 U. S. 296; *Lombard* v. *Louisiana,* 373 U. S. 267. The core of the Court's opinion is that § 26 is offensive to the Fourteenth Amendment because it effectively *encourages* private discrimination. By focusing on "encouragement" the Court, I fear, is forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute simply permissive in purpose and effect, and inoffensive on its face.

It is true that standards in this area have not been definitely formulated, and that acts of discrimination have been included within the compass of the Equal Protection Clause not merely when they were compelled by a state statute or other governmental pressures, but also when they were said to be "induced" or "authorized" by the State. Most of these cases, however, can be approached in terms of the impact and extent of affirmative state governmental activities, *e. g.*, the action of a sheriff, *Lombard* v. *Louisiana, supra;* the official supervision over a park, *Evans* v. *Newton, supra;* a joint venture with a lessee in a municipally owned building, *Burton* v. *Wilmington Parking Authority, supra.*[2] In situations such as these the focus has been on positive state cooperation or partnership in affirmatively promoted activities, an involvement that could have been avoided. Here, in contrast, we have only the straightforward adoption of a neutral provision restoring to the sphere of free choice, left untouched by the Fourteenth Amendment, private behavior within a limited area of the racial problem. The denial of equal protection emerges only from the conclusion reached by the Court

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[2] In *McCabe* v. *Atchison, Topeka & Santa Fe Railway*, 235 U. S. 151, cited by the Court, the complaint of the Negro appellants was held to have been properly dismissed on the ground that its allegations were "altogether too vague and indefinite," *id.*, at 163. In dictum the Court stated that where a State regulated the facilities of a common carrier it could not constitutionally enact a statute that did not comply with the "separate but equal" doctrine. Whatever the implications of the Fourteenth Amendment may be as to common carriers, compare the opinions of Goldberg, J., concurring, and BLACK, J., dissenting, in *Bell* v. *Maryland*, 378 U. S. 226, 286, 318, nothing in *McCabe* would appear to have much relevance to the problem before us today.

Neither is there force in the Court's reliance on *Nixon* v. *Condon*, 286 U. S. 73, a voting case decided under the Fifteenth as well as the Fourteenth Amendment.

that the implementation of a new policy of governmental neutrality, embodied in a constitutional provision and replacing a former policy of antidiscrimination, has the effect of lending encouragement to those who wish to discriminate. In the context of the actual facts of the case, this conclusion appears to me to state only a truism: people who want to discriminate but were previously forbidden to do so by state law are now left free because the State has chosen to have no law on the subject at all. Obviously whenever there is a change in the law it will have resulted from the concerted activity of those who desire the change, and its enactment will allow those supporting the legislation to pursue their private goals.

A moment of thought will reveal the far-reaching possibilities of the Court's new doctrine, which I am sure the Court does not intend. Every act of private discrimination is either forbidden by state law or permitted by it. There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent "encourages" those who wish to discriminate to do so. Under this theory "state action" in the form of laws that do nothing more than passively permit private discrimination could be said to tinge *all* private discrimination with the taint of unconstitutional state encouragement.

This type of alleged state involvement, simply evincing a refusal to involve itself at all, is of course very different from that illustrated in such cases as *Lombard, Peterson, Evans,* and *Burton, supra,* where the Court found active involvement of state agencies and officials in specific acts of discrimination. It is also quite different from cases in which a state enactment could be said to have the obvious purpose of fostering discrimination. *Anderson* v. *Martin,* 375 U. S. 399. I believe the state action required to bring the Fourteenth Amend-

ment into operation must be affirmative and purposeful, actively fostering discrimination. Only in such a case is ostensibly "private" action more properly labeled "official." I do not believe that the mere enactment of § 26, on the showing made here, falls within this class of cases.

III.

I think that this decision is not only constitutionally unsound, but in its practical potentialities short-sighted. Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable. More fundamentally, the doctrine underlying this decision may hamper, if not preclude, attempts to deal with the delicate and troublesome problems of race relations through the legislative process. The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum. This decision, I fear, may inhibit such flexibility. Here the electorate itself overwhelmingly wished to overrule and check its own legislature on a matter left open by the Federal Constitution. By refusing to accept the decision of the people of California, and by contriving a new and ill-defined constitutional concept to allow federal judicial interference, I think the Court has taken to itself powers and responsibilities left elsewhere by the Constitution.

I believe the Supreme Court of California misapplied the Fourteenth Amendment, and would reverse its judgment, and remand the case for further appropriate proceedings.